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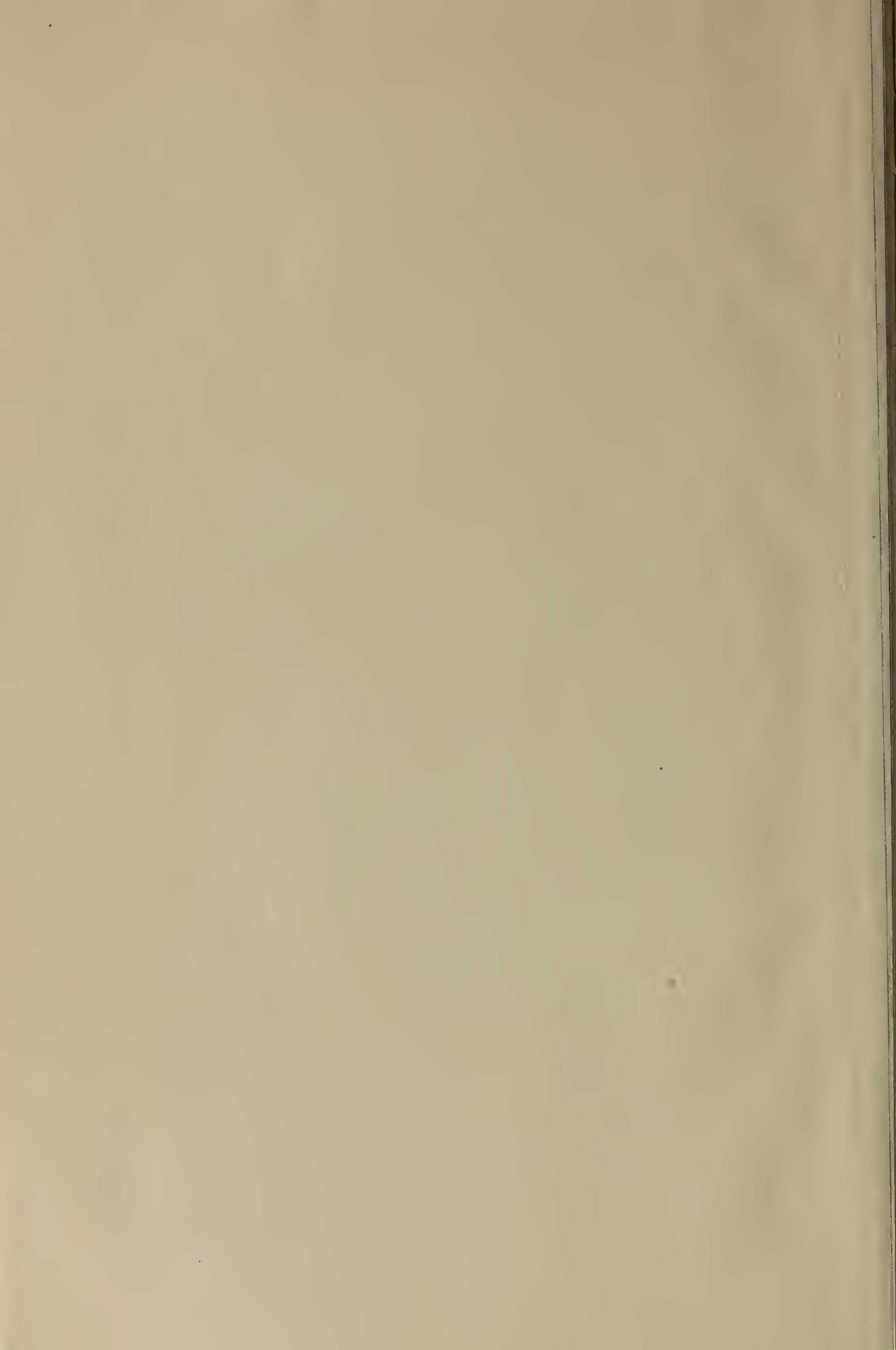

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United States
Circuit Court of Appeals
For the Ninth Circuit.

KARL EMERZIAN,

Plaintiff in Error,

vs.

S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Northern Division.

FILED
NOV 3 - 1924
F. D. MONCKTON,
CLERK

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

KARL EMERZIAN,

Plaintiff in Error,

vs.

S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation,

Defendant in Error.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

PAGE

Amended Complaint 6

Amended Praecipe.......................... 146

Answer to Amended Complaint................ 11

Answer to Counterclaim and Cross-Complaint.... 18

Assignment of Errors....................... 119

Bill of Exceptions.......................... 31

Testimony on Behalf of Plaintiff:

Bakalian, M. N. 71
Cross-Examination 72

Bonnett, Walter........................ 67
Cross-Examination 68

Emerzian, Karl 33
Recalled 78
Cross-Examination 79
Redirect Examination 79
Recross-Examination 81
Redirect Examination 83
Recalled 106
Cross-Examination 107

Foley, E. Y. 75
Cross-Examination 77

Kornblum, S. J. 40
Cross-Examination 57
Redirect Examination 66
Recalled 107

Kornblum, Samuel J. 84

Sakajian, H. 72
Cross-Examination 73

Withers, F. M. 69
Redirect Examination 70
Recross-Examination 71

PAGE

Testimony on Behalf of Defendant:

Barker, J. H. 103
Cross-Examination 104
Redirect Examination 105

Emerzian, Karl 87
Cross-Examination 92

Hensley, Geo. 105
Cross-Examination 106

Klemian, Dick 100
Cross-Examination 100

Maljan, Peter 95
Cross-Examination 98
Redirect Examination 99

Tarjanian, V. 101
Cross-Examination 101

Tarzian, C. 102
Cross-Examination 103
Redirect Examination 103

Exhibits:

Plaintiff's:
Exhibit No. 1 (Contract) 33

Defendant's:
Exhibit B (Agreement) 61
Exhibit C (Agreement) 62
Exhibit H (Schedule) 96

Citation 2

Findings of Fact and Conclusions of Law 25

Judgment 29

Names and Addresses of Attorneys 1

Notice of Motion for New Trial 116

Opinion 109

Order Denying Motion for New Trial 119

Order Allowing Writ of Error 141

Petition for Writ of Error 139

Supersedeas Bond 142

Writ of Error 4

Names and Addresses of Attorneys.

For Plaintiff in Error:

GEO. COSGRAVE, Esq.,
L. B. HAYHURST, Esq.,
Mattei Building, Fresno, Calif.

For Defendant in Error:

LINDSAY & CONLEY, Esqs.,
K. A. MILLER, Esq.,
EDWARD SCHARY, Esq.,
502 Mason Building, Fresno, Calif.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
Northern Division.

---oooOooo---

*__*__*__*__*__*__*__*__*

KARL EMERZIAN, : No. 152-Civil
Plaintiff in Error, *
vs. :
S. J. KORNBLUM and * CITATION ON WRIT
WILLIAM KORNBLUM, : OF ERROR
a corporation, *
Defendant in Error. :

*__*__*__*__*__*__*__*__*

UNITED STATES OF AMERICA – ss.

The President of the United States,

To S. J. Kornblum and William Kornblum, a corporation, and Messrs. Lindsay & Conley, Edward Schary and K. A. Miller,

Greeting:—

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco in the State of California, on the 7th day of August, 1924, pursuant to a writ of error on file in the clerk's office of the District Court of the United States in and for the Southern District of California, Northern Division, in that certain action No. 152, Civil, wherein Karl Emerzian is plaintiff in error and you are defendant in error to show cause, if any there be,

why the judgment given, made and entered against the said Karl Emerzian in the said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

WITNESS Honorable WILLIAM P. JAMES, United States District Judge for the Southern District of California, and one of the judges of the District Court of the United States in and for the Southern District of California, Northern Division, this July 14, 1924, and the Independence of the United States, the 149th.

Wm P James
United States District Judge for the
Southern District of California.

[Endorsed]: Due service of the within Citation admitted and receipt of a copy acknowledged this July 15, 1924 Lindsay & Conley, K. A. Miller Edward Schary—Attorneys for Plaintiff No. 152—Civil IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs. KARL EMERZIAN, Defendant. CITATION ON WRIT OF ERROR FILED JUL 16 1924 CHAS. N. WILLIAMS, Clerk By L J. Cordes Deputy Clerk GEO. COSGRAVE MATTEI BLDG. FRESNO, CALIF. ATTORNEY-AT-LAW For defendant

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
Northern Division.

---ooOoo---

*__*__*__*__*__*__*__*__*

KARL EMERZIAN, : No. 152–Civil
Plaintiff in Error, *
vs. : WRIT OF ERROR
S. J. KORNBLUM and *
WILLIAM KORNBLUM, :
a corporation, *
Defendant in Error. :

*__*__*__*__*__*__*__*__*

UNITED STATES OF AMERICA) ss.

The President of the United States,

To the Honorable the Judge of the District Court of the United States for the Southern District of California, Northern Division, Greeting:—

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said District Court before you or some of you, between Karl Emerzian, plaintiff in error, and S. J. Kornblum and William Kornblum, a corporation, defendant in error, a manifest error hath happened to the great damage of said Karl Emerzian, plaintiff in error, as by his complaint appears,

We, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be had therein, that then under your seal,

distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at the City and County of San Francisco in the State of California, on the 6th day of August next, in the said Circuit Court of Appeals, to be then there held, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 14 day of July, 1924.

[Seal] Chas. N. Williams

Clerk of the District Court of the United States, Southern District of California, Northern Division.

(Seal) R S Zimmerman

Deputy

Writ allowed:

Wm P James

Judge

[Endorsed]: No. 152–Civil IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs. KARL EMERZIAN, Defendant. WRIT OF ERROR FILED JUL 14 1924 CHAS N. WIL-

LIAMS, Clerk By R S Zimmermann Deputy Clerk
GEO. COSGRAVE Mattei Bldg. Fresno, Calif.
ATTORNEY-AT-LAW for Defendant

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.
NORTHERN DIVISION.

S. J. KORNBLUM and	:	No. 152 Civil
WILLIAM KORNBLUM,	:	
a corporation,	:	
Plaintiffs,	:	AMENDED
- vs -	:	COMPLAINT.
KARL EMERZIAN,	:	
Defendant.	:	
- - - - - - - - - - - - - - - -	:	

By leave of Court first had and obtained, plaintiff files this its Amended Complaint, and for cause of action, alleges:

I.

That for all the times herein mentioned, the above said plaintiff was and still is a corporation duly organized and existing under and by virtue of the Laws of the State of New York;

II.

That for all the time herein mentioned, the said defendant was, and now is, a resident of the City of Fresno, County of Fresno, State of California; and that by reason of the diversity of the citizenship of the

plaintiff and defendant, this action was brought in the above said District Court of the United States;

111.

That on the 20th day of June, 1922, at and in the City of Fresno, County of Fresno, State of California, said plaintiffs and defendant entered into a certain written agreement for the sale and purchase of one hundred (100) cars of Muscat Grapes, a copy of which said agreement is hereto annexed, marked "Plaintiff's Exhibit A", and to which Exhibit reference is hereby made, and by such reference made a part hereof;

IV.

That in said agreement it is provided among other things that "on or about the 15th of August, if Seller elects from Buyer to give Seller an advance of Five or Ten ($5,000.00 or $10,000.00) Dollars, the Buyer agrees to do so"; that pursuant thereto, said Seller, the defendant herein, elected to receive an advance from the said Buyers, the plaintiffs herein, in the sum of Ten Thousand ($10,000) Dollars, which said sum was, in pursuance of said agreement, paid by the said plaintiffs to the said defendant;

V.

That at the time of the execution of the agreement aforesaid, it was further understood and agreed by and between parties thereto that the grapes to be delivered pursuant to said Contract by the said defendant to the said plaintiffs were to be of the crop of 1922.

V1.

That thereafter since the execution of said agreement and at divers times prior to the commencement

of this action, said defendant delivered to said plaintiff fo*u*rty-eight (48) cars of Muscat Grapes as per agreement, which said grapes were accepted and paid for by the said plaintiff at the said rate of Fifty ($50.00) Dollars per ton, and pursuant to said agreement in full upon delivery;

V11.

That the said defendant has failed, refused and neglected, and still does fail, refuse and neglect to further deliver to said plaintiff the balance of the one hundred (100) cars of Muscat Grapes, to-wit: fifty-two (52) cars or thereabout, but has sold and delivered the same and all thereof to other persons than these plaintiffs, without their consent, to plaintiff's damage in the sum of Twenty Six Thousand ($26,000.00) Dollars.

V111.

That no part of said sum of Ten Thousand ($10,000.00) Dollars advanced to said defendant by the said plaintiffs has been repaid, save and except the sum of Four Thousand ($4,000.00) Dollars, and that there is still due, owing and unpaid from the defendant to the plaintiff herein on account thereof the sum of Six Thousand ($6,000.00) Dollars, which said sum said defendant has paid no part thereof to the plaintiffs, although demanded.

WHEREFORE, plaintiffs pray judgment against the said defendant for the sum of Thirty Two Thousand ($32,000.00) Dollars, and for costs of suit herein.

Edward Schary

\- - - - - - - - - - - - - - - -

Attorney for Plaintiffs.

State of California :
SS.
County of Fresno :

EDWARD SCHARY, being duly sworn on behalf of the plaintiff in the above entitled action, says; that he has read the foregoing amended complaint, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes it to be true; that the said plaintiff is absent from the County of Fresno, where his Attorney resides; and that the affiant is plaintiff's attorney, and therefore, makes this affidavit.

Edward Schary
- - - - - - - - - - - - - - - -

Subscribed and sworn to before me this 23rd day of March, 1923.

[Seal] Blanche Walling
- - - - - - - - - - - - - - - - -
Notary Public in and for said
County and State.

PLAINTIFF'S EXHIBIT "A".

For and in consideration of the sum of One Dollar in hand paid, the receipt of which is hereby acknowledged, the undersigned agree to the following:

Witnesseth:—

That Karl Emerzian, party of the first *party of the first* part agrees to sell, and S. J. and William Kornblum, parties of the second part, agree to buy One hun-

dred cars of Muscat Grapes at Fifty dollars per ton, loaded, including lugs, in Refrigerator cars.

Same Fruit must be free of rain damage and suitable for Eastern shipment.

Shipment to begin when Fruit is well matured.

If Buyer insists on covered lugs, he must pay the expense of same.

Fruit is to be paid for on loading of cars and surrender of Bill of Lading in Fresno.

On or about the fifteenth of August if Seller elects from Buyer to give seller an advance of Five or Ten Thousand Dollars, the Buyer agrees to do so.

In the event of Strikes or car shortage beyond the Sellers control, Seller is not responsible for delivery.

S. J. & Wm. Kornblum
By S. J. Kornblum

Peter Maljan
- - - - - - - - - - - - -
Witness

Karl Emerzian
- - - - - - - - - - - - - - - - -
S. J. & Wm. Kornblum
- - - - - - - - - - - - - - - - -

I, S.J.K. agree to pay Peter Maljan
the sum of Six Hundred and twenty five
as brokerage in
S.J.K.

On this Twelfth day of June, 1922.
Fresno, California.

[Endorsed]: 152 Civ. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALI-

FORNIA. S. J. KORNBLUM & WM. KORNBLUM a corporation, Plaintiffs, - vs - KARL EMERZIAN, Defendant. AMENDED COMPLAINT. FILED MAR 26 1923 CHAS. N. WILLIAMS, Clerk, By W. J. Tufts Deputy. EDWARD SCHARY ATTORNEY-AT-LAW 502 Mason Building Fresno, California

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IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

—.—.—.—.—.—.—.—.—.—X

S. J. KORNBLUM and	:	No. 152 Civil
WILLIAM KORNBLUM,	:	
a corporation,	:	ANSWER TO
Plaintiffs,	:	AMENDED COM-
vs.	:	PLAINT, COUNTER-
KARL EMERZIAN,	:	CLAIM AND CROSS-
Defendant.	:	COMPLAINT.

—.—.—.—.—.—.—.—.—.—X

Comes now defendant and answering plaintiff's amended complaint herein, for answer thereto,

—I—

Admits that, as alleged in Paragraph IV of said amended complaint, plaintiff advanced to defendant the sum of $10,000 but alleges in that behalf that only a portion of said amount, to-wit: the sum of approximately $7,000, was applied to the purchase of grapes described in plaintiff's said complaint, but that by

agreement entered into between plaintiff and defendant, the sum of $3,000 was applied to the purchase of a certain 14 cars of grapes referred to in defendant's cross-complaint hereinafter set forth.

—II—

Denies, as alleged in Paragraph VII of said complaint, that defendant has failed, refused or neglected or does still fail, refuse or neglect to deliver to plaintiff the balance of 100 cars of Muscat grapes, being 52 cars, or any number of cars of grapes.

—III—

Admits that defendant sold and delivered a portion thereof, being approximately 7 cars to persons other than this plaintiff, but denies that the same was without the consent of plaintiff, but on the contrary alleges that the same was done because of the refusal of plaintiff to receive any of said cars other than the said 48 cars above described and defendant alleges that the remainder of said crop of grapes, being approximately 25 cars, were not sold but, because of plaintiff's failure and refusal to receive and accept the same, became and were entirely destroyed and were a total loss to defendant.

—IV—

Denies that by reason of the facts set forth in Paragaph VII of said complaint or for any reason or from any acts of defendant, plaintiff has suffered damage in the sum of $26,000.00 or any other sum of money at all.

—V—

Denies that there is still due, owing or unpaid from defendant to plaintiff on account of the contract set

forth in plaintiff's complaint or on any other account, the sum of $6,000 or any sum at all.

And further answering plaintiff's amended complaint and by way of counter-claim against plaintiff, defendant alleges:

—I—

That on or about June 12, 1922, plaintiff and defendant made and entered into the contract described in plaintiff's complaint and set forth as "Exhibit A" attached thereto.

—II—

That pursuant to the terms of said contract, defendant delivered to plaintiff 48 cars of grapes and thereupon plaintiff and defendant executed a written modification of said contract whereby plaintiff agreed to accept in full performance of the terms of said contract on the part of defendant the entire product of the Minkler Ranch, the same to be not less than 15 cars of grapes.

That the Minkler Ranch described in said modification of said contract was owned by defendant and bore at said time the crop of Muscat grapes which were the grapes described in said original contract.

That at all times after the making of said original contract and after the execution of the said modification of the same hereinbefore described, defendant has been able, ready and willing to deliver all of the grapes therein described and of the kind and quality therein specified and prior to the commencement of this action defendant duly tendered and offered to deliver to plaintiff the said cars of grapes and the bills

of lading for the same but plaintiff at all times refused and does still refuse to accept the same from this defendant or to pay to defendant the amount due therefor.

—III—

That after the said modification of said original contract hereinbefore described, defendant loaded in refrigerator cars and consigned to plaintiff approximately seven car of grapes, all of the kind and quality described in said contract, and tendered to plaintiff the bills of lading therefor and offered to deliver the same to plaintiff on receipt of the amount of the purchase price thereof, but plaintiff thereupon refused to accept the said bills of lading and then and there advised defendant that it would not accept the same and would not accept any further of the grapes mentioned and described in the said contract and the said modification thereof.

—IV—

That at the time of the refusal of plaintiff so to receive and accept said bills of lading and at the time that plaintiff so notified defendant that it would not receive any more of said grapes, approximately 300 tons of grapes were on the said Minkler Ranch and by reason of the failure and refusal of plaintiff so to accept and pay for the cars of grapes hereinbefore described and to accept the grapes that were then on the said Minkler Ranch and included in said contract and modification thereof, defendant has suffered damage in the sum of $19,022.26, no part of which has been paid, save and except the sum of $2,100.00, and there is unpaid from plaintiff to defendant on account thereof the sum of $16,922.26.

And by way of cross-complaint against plaintiff, defendant alleges:

—I—

That plaintiff is now and at all times herein mentioned has been a corporation organized and existing under the laws of the State of New York.

—II—

That during the month of October, 1922, defendant and plaintiff entered into an agreement whereby defendant agreed to sell and deliver to plaintiff and plaintiff agreed to purchase and accept from defendant 3 cars of Alicante Bouchet grapes, 2 cars of Mission grapes, 7 cars of Zinfandel grapes and 3 cars of Muscat grapes, each car containing 15 tons, and agreed to pay therefor $180.00 per ton for Alicante Bouchet grapes, $150.00 per ton for Mission grapes, $130.00 per ton for Zinfandel grapes and $80.00 per ton for Muscat grapes, upon delivery thereof, the said prices to be $5.00 less per ton in the event the market had lowered at the time of delivery, and plaintiff then and there paid to defendant, as part of the purchase price of said grapes, the sum of $3,000.00.

—III—

That thereafter, by agreement entered into between plaintiff and defendant, plaintiff agreed to accept one car of Pettit Bouchet grapes in the place and stead of 2 of the 3 cars of Alicante Bouchet grapes mentioned in said contract and defendant thereupon tendered to plaintiff bills of lading covering 1 car of Alicante Bouchet grapes originally described in said contract and I car of Pettit Bouchet grapes described in the modi-

fication thereof and offered to deliver the same to plaintiff on payment of the purchase price thereof, but plaintiff thereupon refused to accept the same and then and there notified defendant that he would not accept, receive or pay for any of the grapes so agreed to be sold by defendant to plaintiff, as hereinbefore described.

—IV—

Defendant has duly performed all of the terms, conditions and covenants of said agreement on his part agreed to be performed and duly tendered and offered to deliver the said grapes to the plaintiff but plaintiff notified defendant that he would refuse to accept the same as hereinbefore alleged.

—V—

That by reason of the failure and refusal of plaintiff so to receive, accept and pay for said grapes, as hereinbefore described, defendant has suffered damage in the sum of $22,472.12, no part of which has been paid to plaintiff save and except the sum of $3,000.00 received by plaintiff on the making of said contract, as aforesaid, and there is now unpaid from plaintiff to defendant the sum of $19,472.12.

WHEREFORE, defendant prays that plaintiff take nothing by its said complaint; that defendant have judgment against plaintiff for the sum of $16,922.26 on his counter-claim, and the further sum of $19,-472.12 on his cross-complaint, making a total of $36,394.38, together with interest on the same from and after the commencement of this action at the legal rate, and costs of suit.

Geo. Cosgrave
Attorney for Defendant

STATE OF CALIFORNIA)
(SS.
County of Fresno.)

Karl Emerzian, being duly sworn, on oath, says: That he is the defendant named in the above entitled action; that he has read the foregoing answer and cross-complaint and knows the contents thereof and the same is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

Karl Emerzian

Subscribed and sworn to before me
this April 24, 1923.
Geo. Cosgrave [SEAL]

Notary Public in and for said
county and state.

[Endorsed]: No. 152 Civil. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs. KARL EMERZIAN, Defendant ANSWER TO AMENDED COMPLAINT, COUNTER-CLAIM AND CROSS-COMPLAINT. FILED APR 25 1923 CHAS. N. WILLIAMS, Clerk By W. J. Tufts Deputy Clerk GEO COSGRAVE Mattei Bldg. Fresno, Calif. ATTORNEY-AT-LAW

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

---oOo---

S. J. KORNBLUM and	:	No. 152 Civil
WILLIAM KORNBLUM,	:	
a co-partnership,	:	ANSWER TO
Plaintiffs,	:	COUNTERCLAIM
-vs-	:	AND CROSS-
KARL EMERZIAN,	:	COMPLAINT.
Defendant.	:	

Comes now the plaintiff above named, answers defendant's Counter-Claim herein, admits, denies and alleges as follows:

1.

Admits all of Paragraph 1 of defendant's Counterclaim, to-wit: that on or about June 12, 1922, plaintiff and defendant made and entered into the contract described in plaintiff's Complaint and set forth as "Exhibit A" therein;

11.

Admits that pursuant to the terms of said Contract defendant delivered to plaintiff forty-eight (48) cars of grapes, but denies that thereupon plaintiff and defendant executed a written modification of said contract whereby plaintiff agreed to accept in full performance of the terms of said contract on the part of defendant the entire product of the Minkler Ranch,

the same to be not less than fifteen (15) cars of grapes. And in this connection, plaintiff alleges that on or about the 18th day of October, 1922 at which time said defendant had previously delivered to the plaintiff forty-five (45) cars of grapes pursuant to the terms of the contract marked "Exhibit A" in plaintiff's Complaint; and that upon the delivery of said numbers of cars as aforesaid, said defendant threatened said plaintiff that he the said defendant would deliver no further cars pursuant to the said contract, but that the said plaintiff then and there demanded and procured a writing from the said defendant to the effect that he the said defendant would further deliver to the said plaintiff at least fifteen (15) additional cars of grapes from a certain Minkler Ranch Camp Five purportedly the property owned by the said defendant; that at the time that said writing was made the same was not intended to in any way change, modify or abridge the written agreement heretofore mentioned, but was merely intended as a further assurance of good faith on the part of both parties for the fulfillment of the contract originally entered into;

111.

Denies that all times after the making of said original contract and/or after the execution of the modification of the same, defendant has been able, ready and/or willing to deliver all or any of the grapes therein described and of the kind and quality therein specified; and denies that prior to the commencement of this action, or at any other time, or at all, defend-

ant duly tendered and offered to deliver to the plaintiff the said cars of grapes and the bills of lading for the same; and denies that plaintiff at all times refused and does still refuse to accept the same from this defendant or to pay to defendant the amount due therefor. And in this connection alleges: that said defendant did offer to deliver certain grapes to the said plaintiff herein after a long period of refusal and that when said grapes were offered to the said plaintiff, the same were greatly damaged and inferior in quality and not fit for Eastern shipment as provided in said contract;

IV.

Denies that after the said modification of said original contract, or at any other time, or at all, defendant loaded in refrigerator cars and consigned to plaintiff approximately seven (7) cars of grapes, all of the kind and quality described in said contract, and tendered to plaintiff the bills of lading therefor, and offered to deliver the same to plaintiff on receipt of the amount of the purchase price therefor;

V.

Admits that plaintiff refused to accept the bills of lading tendered by the said defendant after said date of October 18, 1922, and advised said defendant that it would not accept the same, and would not accept any further of the grapes mentioned in said bills of lading for the reason that the same were not the grapes described in the said contract or the modification thereof;

VI.

Denies that at the time of the refusal of plaintiff so to receive and accept said bills of lading and at the

time that the plaintiff so notified defendant that it would not receive any more of said grapes, or at any other time, or at all, approximately three hundred (300) tons of grapes were on the said Minkler Ranch; and denies that by reason of the failure and refusal of plaintiff so to accept and pay for the cars of grapes hereinbefore described and to accept the grapes that were on the Minkler Ranch and included in said contract and modification thereof, defendant has suffered damage in the sum of Nineteen Thousand and Twenty-two and 26/100 ($19,022.26) Dollars, or any other sum, or at all; and denies that the said plaintiff has paid to the said defendant the sum of Twenty-one Hundred ($2100.00) Dollars on account thereof, or any other sum, or at all.

****

By way of answer to defendant's Cross Complaint, plaintiff alleges:

1.

Admits that as alleged in Paragraph 1 of said Cross Complaint said plaintiff is now, and at all times herein mentioned has been a corporation duly organized and existing under the laws of the State of New York;

11.

Denies that during the month of October, 1922, or at any other time, or at all, defendant and plaintiff entered into an agreement whereby defendant agreed to sell and deliver to plaintiff, and plaintiff agreed to purchase and accept from defendant three (3) cars of Alicante Bouchet Grapes, two (2) cars of Mission Grapes, seven (7) cars of Zinfandel Grapes and three

(3) cars of Muscat Grapes, or any other kind or character of grapes, which cars contained fifteen (15) tons, or any other quantity, and agreed to pay therefor One Hundred and Eighty ($180.00) Dollars per ton for Alicante Bouchet Grapes, One Hundred and Fifty ($150.00) Dollars per ton for Mission Grapes, One Hundred and Thirty ($130.00) Dollars per ton for Zinfandel Grapes, and Eighty ($80.00) Dollars per ton for Muscat Grapes, or any other price, or at all, upon delivery thereof, or at any other time, and/or the said prices to be five ($5.00) Dollars less per ton in the event the market had lowered at the time of delivery; and denies that plaintiff then and there paid to defendant as part of the purchase price of said grapes the sum of Three Thousand ($3,000.00) Dollars, or any other sum, or at all;

111.

Denies that as alleged in Paragraph 3 of defendant's Cross Complaint that thereafter, or at any time, or at all, by agreement entered into between plaintiff and defendant, plaintiff agreed to accept one (1) car of Pettit Bouchet Grapes in the place and stead of two (2) of the three (3) cars of Alicante Bouchet Grapes mentioned in said contract; and denies that defendant thereupon tendered to plaintiff bills covering one (1) car of Alicante Bouchet Grapes originally described in said contract and one (1) car of Pettit Bouchet Grapes described in the modification thereof and/or offered to deliver the same to the plaintiff on payment of the purchase price thereof; and denies that plaintiff thereupon refused to accept the same and/or then and

there notified defendant that he would not accept, receive or pay for any of the grapes so agreed to be sold by defendant to plaintiff as hereinbefore described;

IV.

Denies that defendant has duly performed all or any of the terms, conditions and covenants of said agreement on his part agreed to be performed and/or duly tendered and offered to deliver the said grapes to the plaintiff and/or that plaintiff notified defendant that he would refuse to accept the same as hereinbefore alleged;

V.

Denies that by reason of the failure and refusal of the plaintiff so to receive, accept and pay for said grapes as hereinbefore described, defendant has suffered damage in the sum of Twenty-two Thousand Four Hundred and Seventy-two and 12/100 ($22,472.12) Dollars, or any other sum, or at all; and denies that plaintiff has paid to the said defendant the sum of Three Thousand ($3,000.00) Dollars on account thereof, or any other sum, or at all.

WHEREFORE, plaintiff prays that defendant take nothing by reason of his Counterclaim and Cross Complaint herein, and that plaintiff have judgment as prayed for in its Complaint.

Edward Schary

Attorney for Plaintiff.

STATE OF CALIFORNIA :
SS.
COUNTY OF FRESNO :

S. J. KORNBLUM, being first duly sworn on behalf of the plaintiff corporation in the above entitled action, says; that he is the President of said Corporation; that he has read the foregoing Answer to Counterclaim and Cross Complaint and knows the contents thereof; that the same is true of his own knowledge except as to such matters therein stated on information and belief, and as to such matters, he believes it to be true.

Samuel J. Kornblum

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Subscribed and sworn to before me
this 16 day of May, 1923.
Edward Schary [Seal]

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Notary Public in and for said
County and State.

[Endorsed]: 152 Civ. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION. S. J. KORNBLUM, et al, etc., Plaintiff - vs - KARL EMERZIAN, ANSWER TO Counter-Claim and Cross-Complaint Due service of the within, by copy, admitted this 17th day of May 1923 reserving all legal exceptions G Cosgrave Atty for Defendant. FILED MAY 18 1923 CHAS. N. WILLIAMS, Clerk By W. J. Tufts Deputy EDWARD SCHARY ATTORNEY-AT-LAW 502 Mason Building Fresno, California

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

S. J. and)
WILLIAM KORNBLUM,)
a corporation,)
Plaintiff,) Civil No. 152
- vs -)
KARL EMERZIAN,)
Defendant,)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 28th day of January, 1924, before the court without a jury, a jury trial having been duly waived by the parties, and Edward Schary, Esquire, Messrs. Lindsay & Conley, and K. A. Miller, Esquire, appearing as attorneys for the plaintiff, and George Cosgrave, Esquire, and L. B. Hayhurst, Esquire, appearing as attorneys for the defendant, and from the evidence introduced the Court finds the facts as follows, to-wit:

1. That all of the allegations contained in Paragraphs I, II, III and V of plaintiff's complaint are true:

2. That pursuant to the terms of their written agreement, a true copy of which is attached to the complaint and marked plaintiff's Exhibit "A", the defendant elected to receive an advance from the said plaintiff of the sum of Ten Thousand Dollars, ($10,-000.00), which said sum was paid by said plaintiff to the said defendant; that no part of said sum of $10,-

000.00 advanced to said defendant by the said plaintiff has been repaid, save and except the sum of $4,800.00, and there is still due, owing and unpaid from the defendant to the plaintiff herein, on account thereof, the sum of $5,200.00, which said sum has not been repaid to the plaintiff, or any part thereof, although plaintiff demanded the payment of the same before the commencement of this action.

3. That in accordance with the terms of said written agreement, said defendant delivered to the plaintiff 48 cars of Muscat grapes, which said cars were accepted and paid for in full by the plaintiff upon the delivery thereof;

4. That the said cars of grapes so delivered averaged fifteen tons, or 30,000 pounds each;

5. That defendant has failed, neglected and refused to deliver to the plaintiff the balance of the 100 cars of Muscat grapes provided to be delivered to the plaintiff by the defendant under the terms of the agreement - to-wit, 52 cars;

6. That by reason of defendant's failure and refusal to deliver said 52 cars of Muscat grapes, plaintiff has been damaged in the sum of $13,260.00, and in addition thereto in the further sum of $5,200.00, which said sum was and is the unapplied portion of the deposit remaining in the hands of the defendant, together with interest thereon at the rate of seven per cent per annum from the 23rd day of October, 1922, to date;

7. That it is not true that the defendant at any time or at all ever offered or tendered to the plaintiff any car or cars of Muscat grapes of the kind and

quality specified in said agreement, or the bills of lading therefor, which plaintiff refused to accept or pay for. On the contrary the court finds that the plaintiff accepted and paid for, as required by the agreement, each and every car of Muscat grapes of the kind and quality specified in the agreement that was tendered to the plaintiff by the defendant.

8. That plaintiff has fully kept and performed all of the terms, covenants and conditions of said agreement that were under the terms of the agreement to be kept and performed by the plaintiff;

9. That it is true that during the latter part of October and the first part of November, 1922, the defendant tendered to the plaintiff seven cars of Muscat grapes which plaintiff refused to accept, but in this connection the Court finds that the grapes so tendered were rain damaged, in a decayed condition, and unsuitable and unfit for Eastern shipment;

10. That at the time of the refusal of said plaintiff to accept said seven cars of Muscat grapes and at all times thereafter during the season of 1922, the defendant was unable to tender or deliver to the plaintiff any Muscat grapes in car load lots that were free from rain damage and fit and suitable for Eastern shipment;

11. That it is not true that plaintiff and defendant executed a written modification of their contract whereby plaintiff agreed to accept, in full performance of the terms of said agreement on the part of the defendant, the entire product of the Minkler Ranch, the same to be not less than fifteen cars of grapes;

12. That all of the allegations of paragraph IV of defendant's further answer and counter-claim are untrue;

13. That all of the allegations of paragraphs II, III, IV and V of defendant's cross-complaint are untrue.

As conclusions of law from the foregoing facts, the Court finds that plaintiff is entitled to recover damages from the defendant in the sum of $13,260.00, and in addition thereto the sum of $5,200.00, the balance of the deposit now in the hands of the defendant, together with interest on said sum of $5,200.00, and on said sum of 13,260, at the rate of seven per cent per annum, from October 22, 1922, to date, and costs of suit.

That defendant is not entitled to recover anything by reason of his counter-claim and cross-complaint.

Let judgment be entered accordingly.

Wm P James

Judge of said District Court

[Endorsed]: Due Service of the Within Findings of Fact and Conclusions of Law admitted and receipt of a copy acknowledged this 1st day of May, 1924. G Cosgrave L. B. Hayhurst Attorneys for Defendant Civil No. 152 IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION S. J. and WILLIAM KORNBLUM, a corporation, Plaintiff, -vs- KARL EMERZIAN, Defendant. FINDINGS OF FACT AND CONCLU-

SIONS OF LAW FILED MAY 5 1924 CHAS. N. WILLIAMS, Clerk Murray E Wire Deputy

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IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

S. J. and WILLIAM	)	
KORNBLUM,	)	Civil No. 152
a corporation,	)	
Plaintiff,	)	JUDGMENT
- vs -	)	
KARL EMERZIAN,	)	
Defendant	)	

This cause coming on regularly for trial on the 28th day of January, 1924, before the Court sitting without a jury, a jury trial having been waived by the parties, and Edward Schary, Esquire, Messrs. Lindsay & Conley, and K. A. Miller, Esquire, appearing as attorneys for the plaintiff, and George Cosgrave, Esquire and L. B. Hayhurst, Esquire, appearing as attorneys for defendant; whereupon witnesses upon the part of the plaintiff and defendant were duly sworn and examined, and documentary evidence introduced by the respective parties, and the evidence being closed, the cause was submitted to the Court for consideration, and after due deliberation thereon the Court finds its findings and decision in writing, and orders that judgment be entered herein in favor of the plaintiff, in accordance therewith

WHEREFORE, by reason of the law and findings aforesaid, IT IS ORDERED, ADJUDGED AND DECREED that S. J and William Kornblum a corporation, the plaintiff, do have and recover of and from Karl Emerzian, the defendant, the sum of Eighteen Thousand Four Hundred Sixty Dollars ($18,460.00), with interest on the sum of $5,200.00 and on said sum of $13260. from October 22, 1922, to date hereof amounting to $20,445/00, together with plaintiff's costs and disbursements incurred in this action amounting to the sum of $109.35.

Dated: May 5th, 1924

Judgment entered May 5—1924 Chas. N. Williams, Clerk By Murray E Wire, Deputy

____

Judge of said Court

[Endorsed]: Civil No. 152 IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION S J and WILLIAM KORNBLUM, a corporation, Plaintiff, -vs- KARL EMERZIAN, Defendant. JUDGMENT FILED MAY 5 1924 CHAS. N. WILLIAMS, Clerk Murray E Wire Deputy

1 217 D&I 5/7/24 (W)

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
Northern Division.

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—.—.—.—.—.—.—.—.—.—X

S. J. KORNBLUM and	:	No. 152 Civil
WILLIAM KORNBLUM,	:	
a corporation,	:	
Plaintiff,	:	BILL OF
vs.	:	EXCEPTIONS
KARL EMERZIAN,	:	
Defendant.	:	

—.—.—.—.—.—.—.—.—.—X

BE IT REMEMBERED, that on January 28, 1924, this action came on regularly to be tried before this court, a jury having been expressly waived by the parties, Edward Schary, Esq., Messrs. Lindsay & Conley and K. A. Miller, Esq. appearing as attorneys for plaintiff and Geo. Cosgrave, Esq., and L. B. Hayhurst, Esq. appearing as attorney for defendant, at which time the following proceedings were had and evidence taken:

EXCEPTION A.

MR. COSGRAVE: Before that is taken up, if the Court please, I would like to suggest this to the Court, that in the plaintiff's amended complaint he states that $10,000 was paid as a deposit upon this contract for the purchase of 100 cars of grapes. He alleges that of that amount none has

been returned, according to the allegations of Paragraph VIII, except the sum of $4000. He further alleges the failure on the part of the defendant to deliver more than 48 cars of grapes, and asks for damages for that failure in the sum of $26,000. Our understanding is that he is seeking a recovery of the amount unpaid on the theory of a rescission of the contract. I think that is plain. He is also seeking damages, standing upon the terms of the contract. We understand that that position cannot be maintained, and we therefore move at this time, if your Honor please, that the plaintiff be required to elect as to what he is going to base his contention in this case on, whether upon a rescission of the contract and return of the amount of money not repaid or on the element of damages, which calls for a sustaining of the contract on the theory that it is still in force. I understand that the authorities upon that proposition are practically uniform and undisputed. One of the latest cases is that of Lindley v. Berry, cited in 181 Cal. at page 1.

MR. CONLEY: If the Court please, in response to that, we are standing on the contract. It is set up in one count, and that is an element of damages that has been pleaded and the deposit was given to carry out the terms of the contract. Lindley v. Berry has no application to a case of this kind. The Court will remember, probably, that that case is where they brought suit for damages on account of a breach of a contract and

(Testimony of Karl Emerzian.)

put in a second count for a rescission of the contract, and the Supreme Court of this State held that they must elect as between the two. And that has been thoroughly threshed out in the Superior Courts here. I believe I am the first one that raised it and succeeded in getting an instructed verdict in the case. My opinion is that it has no application to a case of this kind. We are not asking to rescind. We are standing on the terms of the contract.

THE COURT: I think the money advanced, as it was pleaded, would be a part of the damage, would it not?—that the money advanced would be a part of the damage. The motion is denied, Mr. Cosgrave.

KARL EMERZIAN

the defendant, sworn as a witness for plaintiff, pursuant to the provisions of Section 2055 of the Code of Civil Procedure of the State of California, testified as follows:

Direct Examination

The contract entered into between plaintiff and defendant, being Plaintiff's Exhibit 1, in words and figures as follows:

For and in consideration of the sum of One Dollar in hand paid, the receipt of which is hereby acknowledged, the undersigned agree to the following:

Witnesseth:

That Karl Emerzian, party of the first *party of*

(Testimony of Karl Emerzian.)

the first part agrees to *seel,* and S. J. and William Kornblum, parties of the second part, agrees to buy One hundred cars of Muscat Grapes at Fifty dollars per ton, loaded, including lugs, in Refrigerator cars.

Same fruit must be free of rain damage and suitable for Eastern shipment.

Shipment to begin when Fruit is well matured.

ıf Buyer insists on covered lugs, he must pay the expense of same.

Fruit is to be paid for on loading of cars and surrender of Bill of Lading in Fresno.

On or about the fifteenth of August if Seller elects from Buyer to give seller an advance of Five or Ten Thousand Dollars, the Buyer agrees to do so.

In the event of Strikes or Car shortage beyond the Sellers control, Seller is not responsible for delivery.

S. J. & Wm. Kornblum
By S. J. Kornblum
Karl Emerzian

Peter Maljan
Witness

S. J. & Wm. Kornblum

I, S. J. K. agree to pay Peter Maljan the sum Six Hundred and twenty five as b*or*kerage in

S. J. K.

On this Twelfth day of June, 1922
Fresno, California.

(Testimony of Karl Emerzian.)

was here introduced on behalf of plaintiff. The witness then testified as follows:

I reside in Fresno and my business is farming. I am engaged in selling grapes in this community. I am acquainted with Mr. Kornblum, plaintiff, and entered into this contract with him in the year 1922. Under that contract I delivered 48 cars and delivered more black grapes and offered him 4 or 5 cars of Muscat grapes and he refused to take them. I tendered him 8 bills of lading all together, 4 black grapes and 4 Muscat grapes. The first time he refused to accept them was October 26th. The grapes were good grapes. They were merchantable in the cars and suitable for Eastern shipment and had not been damaged by rain. They had not been rained on at all that I know of. There was very little rain, a small shower. They were in first-class condition. The general understanding of the term "suitable for Eastern shipment" in this community is grapes not spoiled or mildewed, soft and leaky. If they are not, they are good, merchantable grapes. If the grapes leak, they are not fit for shipment to the Eastern market. The first rain in 1922 came in September, I think. We had a little shower. We had no big storm that year. We did have a storm in Fresno but not down there. The grapes were not exposed to the shower that fall upon my place. They got wet a little but it didn't damage them.

I tendered the bills of lading to Kornblum at the Sequoia Hotel and don't know whether he made an examination of the grapes or not. He didn't tell me he

(Testimony of Karl Emerzian.)

had. I told him in September that I didn't expect him to take certain grapes because I picked those grapes and we couldn't get a car for three, four or five days and I told Mr. Kornblum I wasn't going to ship these grapes to him, I says, because it isn't fit and I put them in the Sanger Winery for grape juice. I didn't tell him that in October. Kornblum never told me he had examined the grapes and that they were rotten or unfit for Eastern shipment. I had two cars and went and offered them to him and he refused to take them. He says "The market is going to pieces and I am not going to take them." That statement was made right in front of the Sequoia Hotel. I was with Mr. Peter Maljan, who was my agent. I offered the other two cars as soon as I got the cars. I offered him on the 25th and 26th and a day after he says "I will take this car but I am not going to pay you for it." The car amounted to $870 and he didn't pay me anything for that car. He says, "You owe me some money." He didn't tell me the grapes were rotten, never said a word about that. The actual or reasonable market value of Muscat grapes on October 26, 1922 went down to almost nothing—you can't give them away. The market value was just as bad on October 25th.

EXCEPTION NO. 1

Q The 1st to the 10th day of October, what was the reasonable market value of Muscat grapes delivered here in refrigerator cars in Fresno, or I will make it the San Joaquin Valley, at that time?

A From $60 to $75.

(Testimony of Karl Emerzian.)

Q What were they worth from the 10th day of October until the 20th?

MR. COSGRAVE: We object to that, if the Court please, as being immaterial, at least at this stage of the case. There has been no breach shown at the present time, at least prior to October 26th, and therefore the price of Muscat grapes at a time prior to that is immaterial at this stage of the evidence.

THE COURT: It might be some evidence leading up to it, showing his general familiarity with the market. It might be some evidence.

Exception.

Q BY MR. CONLEY: ....What was the market value between the 10th and the 20th of October?

A From $60 to $75 a ton.

The Witness continuing: Muscat grapes were worth on the market on the 21st day of October and the 22nd day of October, 1922 from $70.00 to $75.00 per ton. The market went off on the 23d and you couldn't give them away. As soon as I had cars I offered them to him. I offered him the 25th and 26th. During September the grapes were worth one day $60 and another day $65 and $70 and various things. The highest market value during the month of September was $60 to $85 and $75. They were selling on the market for $75 a ton and more and less.

I didn't deliver the 52 cars to Mr. Kornblum because he refused to take it. His first refusal was on the 25th

(Testimony of Karl Emerzian.)
and 26th of October. I didn't deliver the 100 cars before the 25th of October because I delivered as fast as I got cars. I had grapes on other ranches and sold 8 cars besides those to Kornblum. He refused to take 8 or 10 cars after the 25th. I tendered him bills of lading after the 26th right in the Sequoia Hotel. Pete Maljan was there a couple of times. Kornblum says, "Emerzian, you have been giving me chocolate candy, now you are handing me poison and I am not going to take it." After October 26th I tendered him a bill of lading on November 2nd, one on the 11th of November and on the 8th and on November 4th. He says, "I told you a hundred times I am not going to take any more grapes." I filled another car on the 3d and gave it to him on the 4th.

Q Why did you, after he told you on the 26th day of October that he wasn't going to take any more cars, persist in tendering him a half a dozen cars after that? Why did you persist in doing it?

A Because he wanted those cars, and I wanted to give them to him.

I never insisted upon a modification of that contract. He wanted a new contract written, not me. I went up there to collect some money for the bills of lading and he says, "Now, I want you to tell me, Emerzian, how many more cars of Muscats you are going to give me." I says, "I am going to give you all I can load, if I get 10 cars tomorrow, you will get them, if I get one next day, you will get it." He says "Can you give me 15 cars sure?" I says I didn't know for sure but I will

(Testimony of Karl Emerzian.)
give you all I can get. "Well," he says, "I am going to write a contract." "Well" I says, "I don't need no contract, you have got one contract that is just as good as any of them." He says "I want to be sure how many cars I am going to get from now on." "Well" I says, "Mr. Kornblum, I agree to give you 100 cars and I will give them to you as fast as I can get them." "No," he says, "I want to know exactly how many you can give me in the next fifteen days." I says, "If I can, yes. If I can get cars, I will." He says "I am going to write you a contract" and I says "I don't need it but if you want it I don't care." So he sat down to the table and wrote a contract and he signs it. "Well" I says "what is that, let me read it," and I read it and I says "that is the same thing as the other one, I am going to give you all I can get." He says "If you give me 15 cars I am satisfied." I says "No, I kept four or five hundred tons of grapes on the ranch and as soon as I can get cars I will put them in the cars." He says "That is all right, if there is more I will take them."

I happened to go in Mr. Kornblum's room in the Sequoia Hotel because I went up there to collect some money. I never had any trouble getting any money from Mr. Kornblum. I didn't lock the door and I didn't ask Kornblum to lock the door. The door was not locked I am certain about that. I didn't tell Mr. Kornblum that I was not going to give him any more grapes. Mr. Kornblum did not say to me substantially, "Why, Mr. Emerzian, we entered into that contract, I

(Testimony of S. J. Kornblum.)
advanced to you $10,000 when grapes were worth only $42.50 a ton. I showed you that I was a man that intended to keep my contract or I wouldn't have made the deposit and now I find out that you are going to welch upon your contract. Why do you do this?" He asked me if I would give him 15 after this. He never asked if I could give him at least 75 cars. I didn't say he was in good luck if I would give him 15 cars but that I would give him 15 cars. The contract was at his own suggestion and his own writing. He asked me for 15 cars. He wrote the contract saying 15 cars and I made him change it and I said about 15 cars and all I can give you. Kornblum never threatened me with any lawsuit at that time. The subject was never mentioned. On the 23d he began to refuse the grapes and I gave him the cars on the 26th and he took one. I never had any trouble getting my money from Mr. Kornblum. He paid me every time I presented the bill of lading to him. Up to the 18th day of October Kornblum never refused to take any bill of lading of any car of Muscat grapes that I tendered him. He took the bills upon presentation and paid for the grapes. He paid me $50.00 per ton when grapes were worth on the market $42.50 per ton just as he agreed to.

S. J. KORNBLUM

sworn as a witness for plaintiff, testified as follows:

My name is Samuel J. Kornblum, I reside in Brooklyn, N. Y. and am fruit dealer and grower as well. I am growing fruit in California and have some acreage

(Testimony of S. J. Kornblum.)
in Imperial Valley and some here in Fresno and in Modesto. I am thoroughly familiar with the grape business for thirty years or more and make a specialty of selling grapes in the East.

I never did any business with defendant until 1922 when I entered into the contract that has been admitted in evidence here with Mr. Emerzian. There were 45 cars delivered. I demanded grapes every night he came to the lobby of the Sequoia Hotel. I asked him the reason why he didn't give me any grapes that I bought. He says "I can't obtain no cars." I says "Why you can get cars to load other stuff?" "Well" he says "I can get $35 or $40 a ton more and I can give you your grapes any time. We have no contract as to dates when I have to give you the grapes." After the delivery of the 45 carloads, I had conversations with him about a dozen times. I said "Now that they are high, you seem to utilize the cars for other grapes and give them to some other people." He says, "I have got a contract with you and there is no date when I am to give them to you and it is up to me whenever I see fit I will give them to you."

EXCEPTION NO. 2

> Q. Mr. Kornblum, you have been sitting here listening to the testimony of Mr. Emerzian. I don't want to ask you any question about it, but I want you to tell this court what took place in your room upstairs and what led up to it and all that occurred there.
>
> MR. COSGRAVE: If the Court please, it seems to me that that evidence is not material.

(Testimony of S. J. Kornblum.)

Evidently there is enough before the court to show that there has been a written agreement signed between these parties. What led up to that I should think is entirely immaterial. There is nothing in the pleading to warrant the conclusion that it was the result of coercion or anything of that sort. There is no claim made of that kind. Therefore it supersedes whatever written agreement there was before, and also the oral negotiations of the parties.

THE COURT: I suppose anything that occurred between the parties by way of a dispute or a claim for failure and a denial of delivery, and all of those things, must be ventilated here in order to get at the facts of this controversy. Grapes are admitted not to have been delivered in full performance of the contract, and the question is why, and I suppose the only way to get at it is to find out what happened between them during that time.

MR. COSGRAVE: We make the specific objection on the further ground that it appears from the evidence in this case that the negotiations the witness is about to describe resulted in a new contract.

MR. CONLEY: We might call the Court's attention to the fact that it is alleged right in Paragraph VII of the complaint. We have alleged they failed, refused, and neglected to deliver the other 52 cars, and we want to show why this was done.

(Testimony of S. J. Kornblum.)

THE COURT: Objection overruled.

Q. BY MR. CONLEY: Mr. Kornblum, take your time and state all that you remember that occurred up in that room and how you happened to go up there, and all about it.

A I remember it was on the 18th day of October; in fact I remember it was that date because I see the paper was written on the 18th of October. I came in that night into the lobby and he said, "I got to talk to you and we better come upstairs to your room." And I did go up with him, and I came in. We were both in the room and he said, "You'd better lock that door. I don't want no interference. Somebody may come in." I says, "What is it all about?" So he said to me, "You know you are not going to get 100 cars of grapes"—100 cars of Muscats." I says, "I didn't know that Mr. Emerzian. That is the first time, your telling me." I says, "Why ain't I going to get 100 cars of grapes?" "Well," he says, "In the first place you overloaded these cars. You loaded so many more in these cars than I would have given you in ordinary cars." I says, "According to the contract we have no specifications as to how many you are going to put in the car, and the cars being scarce we want to load them all we can." I says, "That is to your benefit." He says, "No sir. I could get $1000 more for some of these cars." "Well", I said, "You couldn't get that when I took them at $40.

(Testimony of S. J. Kornblum.)

a thousand dollars more, and you didn't object to that." I says, "Why do we want to quarrel now about that? Give me all you can. Go right on and give me as many as you can, but give me these cars that you are loading somewhere else." So then I told him, "Well, all right, I will reduce that 10 cars; I will make it 90 cars from the fact that you overloaded these cars." "Oh, no; I will not give you no 90" he says, "60 cars is all I am going to give you. That is 15 more." So I says, "Why that is ridiculous. I can't accept 15 more cars." I says, "I can make $55,000 more and you are just going to rob me out of $55,000." I says, "I was good enough"—or I reminded him then of the fact that this contract was made without any money at all. The wires that he sent back East to me was that the purchase would be without money and I told him that.

. . . . . .

I told him, "Now I was good enough to give you the $10,000 about the 15th of August, and the market was then dropped down to $40 a ton and my $10,000 that I gave you then was wiped out, and that shows you how faithful and how white I was in the matter. Now when the grapes are $85 and $90 you say you are not going to give me only 15 more cars after giving me 45, and the most of these 45 cars was delivered when they were $40 and $45" So he says, "Well, what is the use you giving me this song and dance?"

(Testimony of S. J. Kornblum.)

"Well," I says, "what is the use of arguing about it now? Why don't you go on and give me all you can? Give me a couple of cars a week and you will be giving me the grapes and we won't have any fight about it. I am getting along with everybody else." But he says, "You fellows in New York can't put anything over on me." He says, "I am too long in the business and I know you." "Well," I says, "I am not going to sign any papers," I says, "I will be signing my life away giving you 40 cars of grapes, which I can sell right away for $30,000 profit." I could sell them in the lobby for $30,000 profit. Well, all right, he got up off of the chair and he started to go, and I called him back and I says, "See here, Mr. Emerzian, I don't want a lawsuit. I have got to go back East and I want to go back clean without any lawsuits." I says, "Make that 25 cars more and I will sign that paper." He says, "No, I will give you 15, and the next car I am going to load I will sell it for whatever price I can get and you may as well sue me for 55 cars as any.

. . . . . .

I told Karl it was a pretty hard pill to swallow "but I will have to submit" and I sat down and started to write. I announced what I was writing, and then he says, "You put in, 'Car shortage'" I says, "You go to hell." I says, "Car shortage now with 15 cars you are going to give me?" I says , "I will never get a car now." I was getting

(Testimony of S. J. Kornblum.)

mad, and I started to tear up the piece of paper. He says, "Hold on Kornblum," and he says, "All right, we will put down for shipment" and the next few words he says, "Put down Camp Five, Minkler Ranch." I says, "What is that? That is a new one. We haven't anything in the original contract about Minkler Ranch and Camp Five I don't know where Camp Five is. I know where the Minkler Ranch is, because you showed it and the other ranches to me when I bought the grapes, and now it is Camp Five, and I am not going to sign it." So he was at the door and started to unlock the door, and I says, "All right, I will concede you that," because I hated to have a lawsuit. I told him, "I have got to go back clean." So I submitted to that and I signed the paper.

EXCEPTION NO. 3.

Q I will ask you this: Did any request come from you at any time to reduce the number of cars?

MR. COSGRAVE: Objected to as calling for the conclusion of the witness, if the Court please.

THE COURT: He may answer yes or no and then state what was said.

A Positively not.

The Witness continuing: I gave him $10,000. Of this amount $4700 has been repaid to me. There is $5300 now due. The usual understanding among fruit men of "suitable for Eastern shipment" is that

(Testimony of S. J. Kornblum.)
they must be absolutely sound here because it takes fourteen days to get back East and when they are anywise like decayed here when they leave, they surely arrive rotten in New York. Mr. Emerzian never tendered any bills of lading that I refused to accept but Mr. Maljan did. After October 18th I accepted three cars from Emerzian. On October 26th I accepted the last car of grapes. No bill of lading was tendered me by Emerzian after the 28th that I refused to accept. Pete Maljan told me that there were grapes from the Minkler ranch that were going to be loaded for me about the 29th or 30th of October. I went out and I saw him loading a car from his platform. The grapes were useless. They were rotten. They were leaking right out of the boxes. Every time the loader lifted the boxes they were just running out. The juice was running out. Mr. Emerzian's son was there and I told him we were not going to take the grapes. It rained for three days and we saw the grapes there on the platform. The water dripped right off of the platform right through the floor. The grapes were entirely useless. I told him we were not going to take them; that is I told his son. His son was in charge of the grapes at that time. I called the attention of Emerzian's son to the car that remained on the platform, and I says: "For God's sake, your father don't intend to send me these grapes? This car I will surely not take." "Well," he says, "come back here in about an hour, and I will have him on the telephone, and I will let you know what

(Testimony of S. J. Kornblum.)
he is going to do with them." So I *So I* went on up and looked after some more business, and in maybe two hours I came back and seen his son. He says: "I had a talk with my father, and he told me that he is going to take this car of grapes himself and make wine." So the next day, or the following day, I came up there, and the grapes were not on the platform any more, but I saw a part or a truck—a Ford truck,—going with some grapes into the ranch, and I followed that truck, and I saw a whole lot of the grapes that was on that platform was in the back of the mule barn right on the manure, and they were leaking there, and it had rained then. Well, the next day again that car was there and they were loading them into the car from the barn.

EXCEPTION NO. 4.

Q BY MR. CONLEY: What was the condition of the grapes that you saw they were loading on the car the next day you were there?

MR. COSGRAVE: Just a moment. I ask that my motion go to all of the evidence of this witness respecting the grapes that he is describing as having been on or about the 29th or 30th of October, for the reason that so far he has not connected a single box of grapes with any that he has received or had tendered to him.

THE COURT: He can testify to what he saw and we will see whether they are connected up as being the same grapes that were tendered to him.

(Testimony of S. J. Kornblum.)

Q BY MR. CONLEY: Just go on.

THE COURT: Just tell what you observed, not your conclusion.

A Yes, your Honor. I observed that the same truck was backed up against the barn, and two or three men put them grapes up from the floor onto the truck. I went away, and then I was in Taylor's packing houses and I watched and seen that same truck backed up against the car and load these grapes.

The witness continuing: The following day he tendered me that bill of lading for that car and the car previous, that is, Mr. Maljan did. I told Mr. Maljan he ought to be ashamed of himself to offer me that stuff, that I would not take it as a gift. He never made a tender of any other bills of lading for Muscat grapes that I refused excepting those two.

EXCEPTION NO. 5.

Q I will ask you, Mr. Kornblum, what was the value of Muscat grapes in this valley f. o. b. refrigerator cars from the 1st to the 10th of September, 1922. and all of these questions will be the same.

MR. COSGRAVE: We renew our objection to that, if the Court please, on the ground it is incompetent, irrelevant and immaterial, and I want to make this suggestion, if it is at all material it is on the ground that there was a breach of the contract. No breach has been alleged, as I under-

(Testimony of S. J. Kornblum.)

stand, or even claimed, prior to the 26th of October.

. . . . . .

THE COURT: I will admit the testimony; and I am willing to hear you further, Mr. Cosgrave, on the argument, as to the application of it.

. . . . . .

THE COURT: I will admit the testimony showing the whole range of prices during the whole period, and leave it open for you gentlemen to argue further if you care to.

Q BY MR. CONLEY: State the value from the 1st to the 10th of September, 1922.

A The 1st of September there were quotations at $37.50 a ton f. o. b. refrigerator cars. There might have been just one or two sales, but the general price was $40 on the 1st of September.

The witness continuing: On September 10th the price was $47.50, September 20th $65.00, October 1st $70.00, October 10th $72.50 to $75.00, October 15th $82.50, and on the day of this writing you couldn't place any for $90. There were numerous cars sold during the season at $90.

MR. COSGRAVE: Just a moment, let our objection on the ground that the evidence is incompetent, irrelevant and immaterial appear before the answer.

THE COURT: Yes, it is overruled and you may have an exception.

The witness continuing: The price kept climbing

(Testimony of S. J. Kornblum.)
gradually up to the 23rd of October, then the market went down.

EXCEPTION NO. 6.

Q BY MR. CONLEY: I will ask you if you purchased any Muscat grapes that year from others than the defendant in this action?

A No Muscat grapes, but I did buy others.

Q You only bought, as I understand your testimony, forty-eight cars?

A There were delivered forty-eight cars, but I had to go outside in the market and pay $85.00 and $87.50 to supply my grapes.

MR. COSGRAVE: Just a moment; objected to—

MR. CONLEY: That is what I want, exactly.

MR. COSGRAVE: I desire to object to the evidence and have the objection come before the answer, on the ground it is incompetent, irrelevant, and immaterial, and not the proper measure of damages as to what this defendant had to pay for grapes.

MR. CONLEY: The purpose of the testimony, if your Honor please, is just to show the impossibility of the truth of the statement of the first witness that was upon the stand that this man came to him in the hotel and suggested a modification of that contract by agreeing to accept 60 cars instead of 100 as he had originally contracted for, and our opinion is that if we can show that at that very time and in this town and

(Testimony of S. J. Kornblum.)

during the months of September and October he went out and purchased Muscat grapes at $85 to supply his customers it absolutely negatives the testimony of the first witness who was on the stand, or at the most throws very strong suspicion upon the truth and accuracy of his statements.

THE COURT: Objection overruled.

Q BY MR. CONLEY: How many cars of Muscat grapes did you buy in Fresno County from the 1st day of September until the season was over, during the year 1922?

A I bought—

MR. COSGRAVE: Let our objection go to all of this testimony.

THE COURT: Yes; and overruled.

A 85 cars.

Q BY MR. CONLEY: Then if my figures are right, in addition to the cars purchased from Emerzian you purchased 37 cars of other Muscat grapes?

A Yes, sir. I had outstanding contracts unfilled on the 18th day of October, 1922 for the delivery of Muscat grapes.

EXCEPTION NO. 7.

Q Why did you make these outside purchases? Did you have any reason for it?

A Because I couldn't get them from Emerzian.

MR. COSGRAVE: Just a moment. Our contention is that the measure of damages in this

(Testimony of S. J. Kornblum.)

case does not depend on whether this plaintiff went and bought grapes or not.

THE COURT: It is not offered for that purpose. It is a circumstance, only, as tending, if it does, to contradict the witness who has testified in regard to what this witness stated to him.

MR. COSGRAVE: I suggest, if your Honor please, that evidence of this kind might be material on the cross-examination of the defendant, but not in support of or proof of a fact from which an inference can be drawn that he did or did not do a certain thing. It is purely self-serving, so far as the plaintiff is concerned, to show that he went and did a certain thing, and to say that because of that it is probable that the defendant himself was not telling the truth on the witness stand. That is what it means, and I suggest evidence of that kind is entirely irrelevant and immaterial.

THE COURT: I will permit it; overruled.

A I sold grapes on the strength of this contract.

MR. COSGRAVE: And we object on the further ground, if the court will allow me to do so, that there is no pleading here that these grapes were purchased for any special purpose, and it certainly is the rule of law that in the absence of such an allegation no evidence of this kind is admissible.

(Testimony of S. J. Kornblum.)

EXCEPTION NO. 8.

Q BY MR. CONLEY: After you entered into this contract with Emerzian for the delivery of those 100 cars, did you or did you not enter into contracts with people in the East to deliver them Muscatel or Muscat grapes?

MR. COSGRAVE: We object to that on the ground it is incompetent, irrelevant, and immaterial, and not a proper element of damages in this case, and not within the issues made by the pleadings.

THE COURT: Yes, it is not admitted for the purpose of showing damage, and it is overruled otherwise.

Q BY MR. CONLEY: You may answer the question.

A Yes, sir; I entered into agreements to deliver grapes on the strength of the contract that I knew I had 100 cars, and that I was going to get them when I was told.

MR. COSGRAVE: And we object on the further ground, if the Court please, that evidently this was in writing and the contracts themselves are the best evidence.

THE COURT: Objection overruled.

EXCEPTION NO. 9.

Q Mr. Kornblum, I will ask you, after the 18th day of October, 1922, until the 26th day of October, 1922, whether or not you purchased any cars of Muscat grapes from persons other than the defendant in this action.

(Testimony of S. J. Kornblum.)

MR. COSGRAVE: We object to that as incompetent, irrelevant, and immaterial.

THE COURT: The same ruling. It is not admitted for the purpose of establishing damage, but is admitted for other purposes. Overruled.

A Yes; I bought all I could get.

Q BY MR. CONLEY: How many did you get?

A About 20 to 22 cars.

Q What price did you pay for them?

A I paid up to $87.50. I bought them as low as I could. I bought some at $85, and around $87.50. That is the highest price I paid.

Q And what was the purpose of making those purchases?

A To fill my contracts.

MR. COSGRAVE: Of course our objection goes to all of this line of testimony.

THE COURT: The same ruling.

The witness continuing: After October 18th Emerzian delivered 3 cars of Muscat grapes. The last was delivered on the 26th.

I am president of the corporation of S. J. Kornblum and William Kornblum and do all the buying and make contracts and I have authority to sign checks and have done so all over the State of California. Neither Mr. Emerzian nor anyone for him after I rejected the two carloads of Muscats we have been talking about ever tendered any bill of lading for any other car of grapes on November 2nd or 3rd or 11th. The last he offered

(Testimony of S. J. Kornblum.)

or tendered me was the two cars and I told him I simply wouldn't take them and I demanded my $5300 back and demanded $25,000 to replace what I paid for the difference in the other cars. He laughed and he said "You try and get it."

EXCEPTION NO. 10.

MR. CONLEY: . . . For the purpose of enabling the Court to determine the capacity of the cars, we offer as one exhibit all of the manifests that were furnished by the defendant to the plaintiff in the action, and for that purpose only.

MR. HAYHURST: To which we object, if the Court please, on the ground it is immaterial, irrelevant, and incompetent. The mere fact that the cars were loaded in some instances to 15 or 16 tons is no indication of what was the intention of the parties. We think that "a carload" has a meaning and that we can show the meaning of the parties by the custom of the shippers, and that the railroad company, except in times of extreme car shortage, fixed a capacity to those cars of 12 tons.

THE COURT: Isn't it an indication of what the parties intended by considering what they actually did as far as they went?

MR. HAYHURST: I suppose that is what it is offered for.

THE COURT: That is a common rule of interpretation, when the parties under a contract have proceeded in a certain way, that that is evidence of what was intended to be done.

(Testimony of S. J. Kornblum.)

MR. HAYHURST: I recognize that rule, your Honor, but I still make the objection.

MR. COSGRAVE: If the Court please, there is an additional element in this: The Court will realize that very shortly or a considerable time after this contract was made and about the time this shipment began there was a very acute shortage of cars, and we expect to show that the parties loaded them to utmost capacity at that time.

THE COURT: That of course might be subject to variation by evidence that you might have to offer. The objection will be overruled.

Cross-Examination.

The Witness testified: My late brother was Eastern manager of the corporation in the summer of 1922. He died during that fall. He died the day after I came back and I told him we got a lawsuit. The fact that when this complaint was first filed we were styled a co-partnership and not a corporation escaped my attention. We had made some losses on that year's business. When I made this agreement with Mr. Emerzian, Mr. Maljan was the broker and represented both of us. The contract was made on June 12th. Mr. Emerzian had taken me around to some vineyard but the grapes were not matured. I didn't express a preference for any vineyard. My business is handling grapes of all characters. I was just buying Muscat grapes. As far as I was concerned they could use them for anything they wanted to. I was buying them to re-sell them. The purpose my customers use

(Testimony of S. J. Kornblum.)

them for didn't concern me. My firm negotiated the sale of these grapes to various people in and about New York City. I don't know whether they were to be used for table grapes or not. All white grapes are table grapes. It didn't concern me what they were going to use them for. It is not a fact that these grapes were to be used for wine purposes and that they were bought from my firm for that purpose and that is a purpose I had in mind.

EXCEPTION NO. 11.

Q I say, if they are used for wine purposes they are crushed immediately, aren't they?

MR. CONLEY: We don't desire to make any captious objections, but it seems to me that is argumentative.

THE COURT: Yes; in view of the witness's answer that he had no such knowledge. I will sustain the objection.

The Witness continuing: I saw the grapes when they were on the vines during the summer of 1922 in Tagus and at the Minkler ranch. The shipment began about September, I believe. I will concede that the bills of lading show issuance of 3 on the 4th of September, 2 on the 5th, 3 on the 6th, 2 on the 7th and 1 on the 8th and 1 on the 9th. I testified that Mr. Emerzian presented me 12 bills of lading one day but concede that they were loaded at the times and on the dates that I have just read. There was a slight car shortage that year all through the season. My understanding is that reliable shippers delivered 100

(Testimony of S. J. Kornblum.)

per cent that year. It wasn't exceptional that year. Every year it is the same way, everybody wants to load at once.

EXCEPTION NO. 12.

Q Were you here during the past season of 1923?

A Yes sir.

MR. CONLEY: One moment; if your Honor, please, I object to all of this line of testimony, and base the objection upon the allegations of Paragraph II of their answer, and call your Honor's attention to the wording of it. (Reading).

MR. COSGRAVE: If your Honor please, we plead we are able to perform our contract, and our contract provides that it is subject to shortage of cars, and when we plead we are able to perform it means such cars as were available at that time. The objection of this is, if the Court please, this witness testified that he made this new contract as a guarantee that that clause of the original contract was to be eliminated, as I understood his testimony—

MR. MILLER: No.

MR. COSGRAVE: I will take his testimony and not yours, Counsel,—that he was to be sure of 15 cars. That was his testimony on the witness stand. I want to show just how far that was an element in this situation. If that is the case, it is going to throw a slightly different light

(Testimony of S. J. Kornblum.)

upon the situation from what we have heretofore had.

MR. MILLER: What difference does it make, your Honor? We contend all the way through, your Honor, that there was no modification of this contract because a modification not lived up to or a modification without any consideration does not eliminate the original contract where there is a supplement to a contract * * *

THE COURT: I will sustain the objection.

The Witness continuing: Up to the 18th of October I complained about Emerzian not performing the contract. I had been asking him every night when he came into the lobby how many cars he had loaded for me. I had knowledge that he was shipping other cars. I knew he had other ranches that he was interested in with his brothers. I complained about his failure to give me cars. He told me "I have got over 300 cars of grapes and I am not going to sell another car until your 100 cars is delivered." This was when I made the contract. I had no other arrangement with Mr. Emerzian for buying black grapes.

(It was here stipulated between counsel that exception to all adverse rulings of the court might be shown in the record).

THE COURT: Then Mr. Reporter, if you should write this record up, wherever there has been an objection heretofore, the exception of counsel will show following the ruling.

The Witness continuing: I don't remember writing

(Testimony of S. J. Kornblum.)
any memorandum or slip of paper about the sale of any other grapes than in this contract. I never at any time said to Mr. Emerzian that he was to apply about $3000 of the money already in his possession on any other contract. I didn't do anything of the kind. I don't know what slip of paper you refer to. On the 18th of October I hadn't terminated the contract because he failed to give me cars fast enough. I never did terminate the contract at any time. I wrote the contract dated October 18th.

(Here the agreement of October 18th was offered in evidence by defendant, admitted and marked Defendant's Exhibit "B" and "C", which said exhibit is in words and figures as follows:

S. J. Kornblum
of Brooklyn N Y

(S)
SEQUOIA HOTEL
E. C. White Mgr.
FRESNO, CALIFORNIA

October 18th 1922

I hearby agree to accept On the 100 cars Moscats to be loaded in refergerator as per contrackt up ɔ the present time he K Emerzuan allready delivered 45 cars K Emerzian to deliver no less than 15 cars more that will make 60 cars instead 100 cars if Minkler ranch however has more he agrees to deliver all

S. J. Kornblum
of Brooklyn
N Y

(Testimony of S. J. Kornblum.)

(S) SEQUOIA HOTEL
E. C. White Mgr.
200 rooms

10/18

I hearby agree to acceppt On the 100 cars Muscat to be loaded in refrigerators as per contrackt up to present time he K Emerzian allready delivered 45 car K Emerzian agrees to deliver 15 more cars anyhow Or if there is more on Minkler Ranch Camp Six he must give to me or deliver

S J Kornblum
K Emerzian)

The Witness continuing: The price of Muscat grapes went off that year on October 23d, I believe. I was in constant communication, telegraphic and otherwise, with my brother in New York City throughout the season. It is not a fact that on October 18th 15 additional cars were all that I could handle. It is not a fact that I had received advices from my brother in New York that the market on Muscats were weakening. The market broke on the 23d and gradually lowered. It broke three, four or five days due to rain damage. There had been no rain in October that would damage the goods reaching New York about the 25th or 26th. People wouldn't buy because they knew the grapes was damaged by rain and that was the cause of the lowering of the market. No rain occurred prior to the 23d.

Q But there having been no rain damage on

(Testimony of S. J. Kornblum.)

the 23d and the market beginning to break on the 23d, how did that affect this situation?

A How did the market get lower, do you mean?

Q How did it get lower because of rain damage before there had been any rlain? You can't answer that, can you?

A I don't understand your question.

The Witness continuing: The rain damage was not an element in the break in the market on the 23d. That wasn't the cause of the market breaking because of the rain, not on the 23d, but you said the latter part of October. I don't know what did cause the break in the market. I know the market lowered. I assume that Karl Emerzian is well fixed and able to respond to any judgment. I thought I better take 15 cars, better than nothing. It was my understanding that he was going to deliver the 15 cars in the next few days when the agreement was accepted. I was not going to let him put in "car shortage" in that so he would have an excuse. I knew Mr. Emerzian was responsible financially but I didn't give up 40 cars of the valuable grapes voluntarily. I thought half a loaf was better than nothing. I agreed to accept the measly 15 cars because a measly 15 cars was worth then $9000 and I thought I better take $9000 and put it in my pocket than to sue for the 40 cars of grapes which amounts to $30,000. He alleged that he overloaded the cars and nobody else was delivering and he had tried to get the grapes and he hadn't gotten them he

(Testimony of S. J. Kornblum.)
said and I would have to fight all of that to win my 40 cars and I thought I better get the 15 cars if I could. He told me positively he wouldn't give me any more cars. He was going to load the next cars and sell them in the lobby whatever price he can get so I thought I better get the 15 cars.

We were in my room about an hour and a half. He asked me to lock the door and I did. He says "You give me a paper that I will accept 15 cars instead of 40" and I didn't want to. He said "The next car I am going to load I will sell for whatever I can get in the lobby and you may as well ask for the 40 cars as less. You are not going to get another car." To avoid a law suit I signed. This was before I signed. He told me "You give me a paper that you accept 15 cars instead of 40." I don't know why he agreed to give me all on the Minkler ranch. It took us half an hour, the argument. I didn't want that Minkler window in so he could fly out but that was the last consideration and I wanted to avoid a lawsuit and he made me put in this Minkler proposition and Camp Five and I didn't know where it was any more than Camp 105. It isn't a fact that I asked Mr. Emerzian to reduce the number of cars that I was compelled to take from 100 to 60 and he agreed to it in consideration of my agreement to take all that were on the Minkler ranch. I took a car on the 26th notwithstanding that the market had lowered. I suppose I got the cars after the 19th just about as fast as I did before except at the very beginning of the season.

(Testimony of S. J. Kornblum.)

EXCEPTION NO. 13.

Q To whom else, other than to Charles Emerzian, the nephew, did you tell that this contract had been extorted from you?

MR. MILLER: What difference does that make? We object to it.

MR. COSGRAVE: I think it is very important to show whether it came at his suggestion or Karl Emerzian's suggestion.

MR. MILLER: It wouldn't reflect the transaction between the parties. It is immaterial.

THE COURT: I will sustain the objection

The Witness continuing: I never told Karl Emerzian that he obtained this contract by coercion or compulsion. He knew it. He was there. I never examined any of the grapes shipped from Minkler other than two cars that I have testified to. I wasn't interested in any more of the grapes. I would not have been interested in any Muscat grapes at any price after the 1st of November. On the 26th the market price was $40, maybe $50. The market would go off $25 in a single day. There was no market at all on the 28th. You couldn't give them away. I didn't examine the car I got on the 26th nor the one I got on the 23d. It was not my custom to examine the cars as they were brought in or as the bills of lading were brought in. I was always pleased with the stuff that was loaded before the rain.

The first time I told Mr. Emerzian that the contract was off and that I was going to sue him was when

(Testimony of S. J. Kornblum.)

I demanded my money back. That was at the time when the two cars was tendered me. I got news that the market was down every night. The first night on the 23d, and on the 23d it went off 25 cents a lug back East. There are 1400 crates to the car ordinarily I believe or 1360. If there were 15 tons to a car that would be about $340 a car. If there were 15 tons to the car that would make a difference of about in the neighborhood of $20 a ton. I didn't get any news before the 23d that there were 3,000 cars in New York that could not be sold. I have not any wires or telegrams that I received from my brother in New York at that time. They are back East. The market went off more on the 24th, 10, 15 or 20 cents more. It went off gradually every day. I bought some grapes after the 23d. I guess I bought the 24th and 25th maybe. I took bills of lading from everybody that I had bought them from previously. They offered them to me and I took them. The goods I took after the 23d or 24th were goods that I had contracted for before that time.

Q Did you buy any goods after the 23d.

A I don't remember of buying any, no sir. I had frequent talks with Mr. Emerzian following the 18th, 23d and 24th. I never had any conversation with him where I proposed to him that I would take his grapes and he and I stand the loss after October 23d together.

Re-direct Examination.

The Witness testified: Mr. Emerzian never paid

(Testimony of Walter Bonnett.)
any part of this $5300 nor of the $25,000 damages. I had a great many orders to fill that I couldn't get grapes to fill. I did not fill them after the 23d. It was after the 18th. I bought all of 10 carloads. I bought from people in the lobby, from Sakajian and from Jack Files and I believe from Mr. Foley. Mr. Sakajian was a partner of mine at that time. I think he had one or two cars. I don't remember buying any from Mr. Foley. I can't say where I bought the cars but I know I bought a lot of cars.

EXCEPTION NO. 14.

Q Did you see any grapes that were fit for shipment to the Eastern markets after that date?

A No, sir.

MR. HAYHURST: That is objected to on the same ground.

MR. COSGRAVE: We desire an exception to the rulings, if your Honor please.

WALTER BONNETT

sworn as a witness for plaintiff, testified as follows:

My name is Walter Bonnett. I am *metereologist* of the United States Weather Bureau and have been in that service 22 years and in Fresno nearly 14.

EXCEPTION NO. 15/

Q BY MR. CONLEY: Refer to your records and tell us what the precipitation was in the months of September and October, 1922.

A In the month of September there was no rain at all at Fresno. In the month of Octiber,

(Testimony of Walter Bonnett.)

on the first day, there was a trace, that is, an amount too small to measure, or at least less than one-hundredth of an inch. On the 2nd day of October there was .01 of an inch. There was no rain then until the 27th, when there was .51. That is all the rain in October.

A What was the precipitation here in the month of November, the first ten days of November?

MR. HAYHURST: Do our objections, if the Court please, and exceptions, go to all of this testimony?

THE COURT: It may be shown.

MR. HAYHURST: We would like the record to show our objections and exceptions to the ruling if the ruling is to be the same.

THE COURT: It is understood that you object to all evidence as to the rainfall for September, October, and November, 1922?

MR. HAYHURST: Yes, sir.

THE COURT: And the objection is overruled and you may have your exception.

Q BY MR. CONLEY: What was it for the the first ten days in November?

A On the 2nd day of November there was a trace; no rain then until the 7th, when there was .12. On the 8th, .09; on the 9th, .29, and on the 10th, .11/

Cross-Examination

The Witness testified: The rain records that I have are from observations made here in the city during

(Testimony of F. M. Withers.)
the time mentioned. From my experience as a weather man in this vicinity, it has been my observation that the rainfall, even in different portions of Fresno County varies greatly according to the locality in the county. Sometimes the variation is material within a few miles. The record of rainfall in Fresno City is not necessarily an indication of the rainfall at a place 20 miles from Fresno. Sometimes we have quite a precipitation in Fresno City but say 15 or 20 miles away there will be a very light precipitation and vice versa and possibly none at all.

F. M. WITHERS

sworn as a witness on behalf of plaintiff, testified as follows:

My name is F. M. Withers. I reside in Los Angeles and am in the fruit and produce business and have been in such business about ten years. My experience has been shipping all kinds of fruits and produce all over the state, especially grapes during the grape season, particularly in Fresno County. I have operated in Fresno County the last three years. During 1922 I handled between 175 and 225 cars. The first heavy rain came October 26th, 27th or 28th. It was around that time. I know where the Minkler section is. I was buying grapes out of that section. I don't know how much rain they had there but there was a heavy rain storm in the entire county as I remember it. I saw the grapes all over the county after the rain. The grapes were generally damaged from the rain. In my

(Testimony of F. M. Withers.)
opinion none of those Muscat grapes were suitable for Eastern shipment after the rains came. Due to the fact that the berries were getting away from the cap stems and in some instances starting to blister and show spots due to rain damage in my opinion. If that kind of grapes had been shipped they would reach the market like New York in decayed condition.

Re-direct Examination

EXCEPTION NO. 16.

Q What was the price of Muscat grapes from the 1st of September until the 1st of October?

MR. COSGRAVE: We renew our objection to this line of testimony on the same grounds heretofore urged.

THE COURT: Yes; and the objection is overruled.

MR. COSGRAVE: And we take the same exception.

Q BY MR. MILLER: F. O. B. Fresno.

A From the 1st of September to the 1st of October the market started out on Muscats for the season, which is practically the 1st of September, around $37.50 a ton f. o. b. cars, and remained stationary for about a week, from $37.50 to $40. Then the market started to climb, and around the 1st of October the market was in the neighborhood of $60 to $65 a ton, as I recall.

Q From the 1st of October until the 18th of October what did it get to?

A The market kept on climbing on all va-

(Testimony of M. N. Bakalian.)

rieties of grapes which included Muscats, and around the 18th of October the market was very strong, at $85 a ton.

Q What was the highest it got during the season?

A I heard of some sales higher than $85, but I didn't make any myself, so $85 is what I would want to base my figure on.

The Witness continuing: The market went off as a matter of common history on the 23d.

Re-cross Examination

The ready sale of grapes did not stop between the 15th and 20th, no, sir, not until the 23d. It happened in 24 hours. The cause might have been the immense number of cars shipped from this neighborhood.

(Here an adjournment was taken until January 29, 1924, at 10 A. M.)

M. N. BAKALIAN

sworn as a witness for plaintiff, testified as follows:

My name is M. N. Bakalian. I live in Fresno. I knew Mr. Kornblum in 1922. About the latter part of October, 1922, I was shipping grapes. We were shipping in a partnership with Mr. Sakajian and Mr. Kornblum. I remember on one occasion going to Exeter with Mr. Kornblum. He took me down to Minkler Station and examined some grapes while there. It was after the rain of that fall about the last of October or the first of November. I can't remember just the date. It was after the rain. We examined the grapes

(Testimony of H. Sakajian.)
there. They were on the track on the car at the station. The grapes were mouldy and wet. They were not fit for Eastern shipment. The grapes were wet and they were getting mouldy and rotten.

Cross-Examination

The Witness testified: I was in partnership with Mr. Kornblum at that time but not in those particular grapes. I was partner with him this year. I have no business relations with him now and do not know whether we will be partners in next year or not. The grapes that I saw were about four or five hundred boxes—I don't know, I can't tell, I am guessing at it. The boxes were on the car—part of them loaded in the car. I don't know what kind of a car it was. It wasn't a passenger car. It is about two years and I cannot remember. I don't remember whether it was a box car or not. I don't know how long the grapes had been picked. Mr. Kornblum told me they were Karl Emerzian's grapes. Outside of that I don't know whose grapes they were. Mr. Kornblum talked to a man there. He kicked about the condition of the grapes, that they were not suitable to be loaded. The man said he couldn't do anything else besides just doing what was ordered of him. I don't remember whether the man said these grapes were for Mr. Kornblum or not.

H. SAKAJIAN

a witness sworn on behalf of plaintiff, testified as follows:

My name is H. Sakajian. I live in Fresno. I have known Mr. Kornblum since 1919 or 1918. Since 1919

(Testimony of H. Sakajian.)
I have been somewhat connected with Mr. Kornblum in a business way. He and I were interested in buying grapes in this locality and shipping them East. I ran a grape-packing house for three years, I was foreman for some California growers or shippers for three years. I am also a grower of grapes and have been familiar with growing grapes for eight years. At my home in the old country I used to know about grapes. I have been engaged in the growing and marketing of grapes in Fresno for ten years. When I used to work for the California Growers & Shippers we rolled two or three hundred cars a year. I was not interested in the grapes involved in this lawsuit. I know where Minkler Station is. I don't exactly remember when the rains came in 1922 but I know it was in the latter part of October. I saw one car of those grapes at Minkler after the rain and saw the grapes in the car. They were wet, absolutely wet grapes. There was juice running out and rain and water. The grapes I saw were not suitable for Eastern shipment. They were rain damaged. These were Muscat grapes. After the heavy rain of the latter part of October, 1922, there were no Muscat grapes or Malagas that were fit for shipment to an Eastern market.

Cross-Examination

The Witness testified: I didn't notice whether there were any other cars of grapes there at that time. There is a little shed standing there, a platform. I didn't notice whether the top was covered or not. I

(Testimony of H. Sakajian.)

do not remember the number of the car. It was a refrigerator car. It was lug-filled. When I was there the loader was waiting for another load to finish the car. The car was almost full. I think there were seven or eight hundred boxes in the car. They were open lugs and were stacked all over each other in tiers. I went into the car and examined them. I could see the top layer, two or three rows on each side. I didn't take out any of the boxes or touched any. They must have been picked after the rain because they were wet unless they sprinkled water over them. I could see water on top of the grapes. They were soaked. The grapes were wet. I was there about five or ten minutes. We just looked at them and walked off. The name of the loader was Mr. Tarzian. I don't know where the grapes came from. I closed the season with Mr. Kornblum that year on the 10th of November. The last car of grapes went out on the 10th of November, if I aint mistaken. I didn't personally attend to any shipping from this locality after November. It was not because of the rain that we didn't ship any more grapes after the first of November. It was because we didn't have any grapes left here. Everything we had under contract we had cleaned up and shipped by the first of November, in Fresno but not in Exeter. I am still interested with Mr. Kornblum. We own a ranch together. It is a vineyard. On this visit to Minkler with Mr. Kornblum, I don't remember where we went besides this station. I guess we went to Arakelian's shed but I don't remember. We had business down

(Testimony of E. Y. Foley.)
at Exeter and just stopped a few minutes at Minkler to see this car and went right on to Exeter.

E. Y. FOLEY

sworn as a witness for plaintiff, testified as follows: My name is E. Y. Foley. I am a fruit shipper and have been in that business for 18 years. I am familiar with the market price of grapes during the year 1922.

EXCEPTION NO. 17.

Q Mr. Foley, will you state to the Court what the value of Muscat grapes per ton was from the first day of September until about the tenth day of September, 1922?

. . . .

MR. COSGRAVE: We object, of course, to this line of evidence upon the grounds stated yesterday, that is, that it is incompetent, irrelevant and immaterial and not tending to establish a proper measure of damages in this action.

THE COURT: Objection overruled.

. . . .

A We started selling Muscat grapes in the early part of August forty to forty five dollars a ton. On the 25th of August we sold them at $52.50. On the 27th of August we sold at $60.00 a ton. On the 29th of August we sold at $62.50 a ton, and the market from the first of August ranged from $62.50 to $72.50 a ton.

MR. CONLEY: You mean September, don't you?

(Testimony of E. Y. Foley.)

A From the first of September to the 25th of September.

Q You used the term "August."

A I meant September. We did not sell any, however, at $72.50 a ton until the 23rd of September. From that time on we sold up to the third of October at $80.00. From the 3rd to the 6th we got $85.00 and I sold a car on the 13th for $100.00 and that was the last sale we made on Muscats.

The Witness continuing: The figures I have given represent the market value of those grapes during the time mentioned. After the 10th nobody had any grapes to sell on account of the car shortage and you could get almost any price you asked for a car for a period of a few days. About the 2nd of October Mr. Kornblum got five cars of grapes through us at $82.50 a ton. I have an indistinct recollection of when it rained in 1922, on October 27th we had about half an inch of rain. The grapes most susceptible to rain damage are white wine grapes and Muscats. Malagas are a much stronger grape than a Muscat. Most of the Muscats lay close to the ground. Of course there are some of the vineyards with high vines that are off of the ground but there are not many of those. After October 27, 1922, I saw some grapes that were sound but I have my doubts about them carrying to the Eastern market. The railroads were making extremely poor time and we were not able in the season 1922 to get any grapes to the Eeastern market before the rain

(Testimony of E. Y. Foley.)
and how could we expect to get them there after the rain? What I saw after October 27th were in worse condition than they were before that. They were soft occasioned by the rain. Whether or not any Muscats that had been rained upon and became soft were fit to ship to Eastern market would depend entirely upon the purpose that they were to be used for and the condition of your market. After rain the grapes have a tendency to get soft and they crack around the cap stems and it makes them start to mould. I didn't see any grapes after October 27th that were free from rain damage.

Cross-Examination

The Witness testified: I discontinued shipping all grapes after the 23d of October due to no market you might say in the East. I was not able to get any buyers for any kind of grapes in Fresno after the 23d of October. A good many of the Muscat grapes were used for wine making purposes. Eighty five per cent I think of all the grapes that were shipped for the table or anything else have been used for wine in the last two or three years. The rain occurred on October 27th. I wouldn't call it a heavy storm. It was about half an inch in Fresno. That is not ordinarily a very serious item in the grape industry. We have shipped grapes after we have had more rain than that. It would depend largely on whether the vines were high vines or not. I have seen lots of grapes, Missions and other varieties of grapes, that looked good—the high vines—after rains but at the same

(Testimony of Karl Emerzian.)
time they have had trouble at the Eastern end when the goods arrived. We have cases where the grapes went through in good condition but in most cases they do not carry well. The best comparison I can give you is we are still shipping grapes yet from last year's crop and they are still taking them. Some of them are going out of cold storage. The last season we didn't quit shipping until the 23d of December which was due entirely to the demand and purposes they wanted the grapes for. We had seven or eight heavy frosts, I think. I don't know whether they make brandy out of them or wine or what.

I couldn't sell any grapes in Fresno after the 23d and didn't attempt to buy any Muscat grapes. On the 23d you might have found a buyer on the 23d and 24th but the Eastern markets broke badly on the 23d and all indications were for heavy decline and nobody was looking to buy grapes among shippers. They were trying to unload what they had.

KARL EMERZIAN

re-called by plaintiff, under the provisions of Section 2055 of the Code of Civil Procedure of the State of California, testified as follows:

The bills of lading tendered to Kornblum after October 18th were tendered by me personally. I offered them and also Mr. Maljan did. I can't remember whether I gave him every one of them. I don't quite remember those dates exactly. One I offered him on the 26th and the next one on the 28th

(Testimony of Karl Emerzian.)

and the next one on the 2nd; the next one on the 3d and the next one the 5th of November. I don't exactly know which I offered him on the 11th of November but I offered him every one. He refused to take them. These grapes were all from the Minkler ranch. I had enough grapes on the Minkler ranch to fill the entire contract. I didn't own four other ranches personally but I had an interest in them. I had about 2000 tons of green grapes in the year 1922. I didn't sell the grapes for Camp Five. I hadn't sold a pound. I sold 108 cars all told in 1922. I didn't get refrigerator cars from the railroad company. I got part of them from the railroad company.

Cross-Examination

by Mr. Cosgrave. The Witness testified:

I sold and delivered to Kornblum 48 cars. Besides that I loaded four cars more and shipped them back East—4 or 5 cars. Those were the ones he refused. I sold 8 cars to others than Mr. Kornblum. Part of that was Malagas mixed you know. I sold about 5 cars solid Muscats and these were all of the Muscats that I sold other than the ones that were sold to Mr. Kornblum.

Re-Direct Examination

by Mr. Conley. The Witness testified:

I never sold 100 cars of grapes of all kinds during the year 1922. I said a moment ago I sold 108 but I couldn't deliver them I couldn't get the cars to deliver them. In order to tell how many cars I shipped at that season in addition to all I delivered to Mr.

(Testimony of Karl Emerzian.)
Kornblum or offered to deliver to him I would have to look over the bills. I am not interested in five or six different places with five or six different people. I have just one partner. He is with me on Favorita Ranch. 8 cars of grapes were sold from the Favorita ranch, that was all. I owned the Tagus ranch in Tulare County. 7 cars of Muscats were sold from the Tagus ranch to Mr. Kornblum. I sold him 5 cars of Malagas and he took two of them and he didn't take the rest. After he refused to ship the Malagas I shipped them back East. I didn't sell from the Tagus ranch any grapes other than the ones I offered Kornblum except Malagas. I didn't get to exceed 15 refrigerator cars for the Tagus ranch in 1922 and half of that was Malagas. I got about 15 cars for Tagus and about 8 cars at Nevills. The only cars I got in Fresno County was at Nevills Spur from the Southern Pacific Company, was 8 cars—8 or 9, yes. All the cars I got from the Santa Fe Company were got for the Minkler ranch. I sold no cars to anybody else except the cars that were offered to Kornblum. I can't tell offhand the number of cars I got from the Santa Fe Company in Fresno County during 1922 without looking at my bills of lading. The railroad will show it. There is another ranch that I am interested in. It is at Mt. Campbell. I raise all varieties there. I shipped 8 or 9 cars of wine grapes and Malagas from that ranch in 1922. I consigned them to one firm, I forget the name.

I have one brother that is in partnership with me.

(Testimony of Karl Emerzian.)
He had his own ranch. He was ordering cars for his own ranch. I don't know how many cars he ordered for his own ranch. I purchased no cars of Muscats from any body else during that season. I did buy some Muscats off Rankin.

Recross-Examination

by Mr. Cosgrave. The Witness testified:

In explanation of my last answer, Mr. Kornblum came in and wanted to buy some more Muscats and wine grapes from my ranch. I told him what I had I was going to fill my contract with from my ranch and I haven't got any more and he forced me to go and buy some more grapes and I did and he wrote a contract of 7 cars of Zinfandels at $80 a ton that he bought from me and 2 cars of Alicantes at $180, 7 cars of Zinfandels at $150 and 3 cars of Mission or 2, I don't exactly know which, for $150, and he forced me to go and buy those grapes and I did it because he wanted to buy the grapes. He took a few cars of them and when the price came down he told me he didn't want them and that agreement said if black grapes come down Emerzian should take $5 a ton less in his own writing and he applied $3000 on that agreement. That is why I bought the grapes from Rankin. That agreement was made with me the 5th of October.

The season of 1922 was a very short car season.

EXCEPTION NO. 18

Q Do you know generally to what extent or what percentage of contracts such as yours were filled in Fresno County?

(Testimony of Karl Emerzian.)

MR. CONLEY: We object on the ground it is incompetent, irrelevant and immaterial.

. . . . .

THE COURT: Do you mean by that what percentage of cars did you get to meet the demand?

MR. COSGRAVE: Yes; that is it.

A 25%.

MR. MILLER: May we offer another objection? The pleadings here allege they were able and willing to furnish these cars, and what difference does it make?

. . . . .

THE COURT: I will sustain the objection.

. . . . .

MR. COSGRAVE: . . . It is my understanding, if your Honor please, that at the time this answer was drawn that in the first place there would be no question about the change to the 52 cars, but they charge us with a refusal to deliver. We allege that we did not refuse to deliver and I think we are within our rights in showing that we did not refuse to deliver because of this arrangement that was made, or because of the shortage of cars, because that is one of the provisions of the contract "subject to shortage of cars" . . . if there is any question about this we would have to suggest an amendment to our answer so as to cover the point. . . .

THE COURT: I think, Mr. Cosgrave, that

(Testimony of Karl Emerzian.)

your allegation in Paragraph III, where you allege in terms a refusal of the plaintiff to receive any car than the 48 cars is to be construed as being the only excuse that you have for not delivering, that he refused to receive them.

MR. COSGRAVE: That is what I wanted to get at. If that is the view of the Court I would suggest that we will ask leave to make an amend ment to it so as to offer on that proposition that there was a shortage of cars. . .

THE COURT: Coming at this time it is too late to permit an amendment to raise an issue which would be entirely new to the case and in the midst of the trial, and I think the only way discretion could be exercised without abusing it would be to deny the application, and it is so ordered.

The Witness continuing: In reference to the number of cars that I was interested in furnishing to other people, I have definitely in mind the number of cars that I actually did sell or tender to other people other than Mr. Kornblum and it was 7 or 8 cars.

Re-Direct Examination

by Mr. Conley. The Witness testified:

I entered into an agreement with Mr. Kornblum to furnish him additional cars of grapes. Mr. Cosgrave can tell you where that agreement is.

MR. COSGRAVE: We haven't got it. We went over that yesterday, if the Court please, during Mr. Kornblum's examination. He admitted

(Testimony of S. J. Kornblum.)

that there was such a writing, that there was a memorandum described by the witness, but it was not signed by anybody; that it was in Kornblum's hand-writing.

MR. CONLEY: Then that is no agreement, is it? I don't know whether it is or not. It was passed on by the Court yesterday and the same objection was made yesterday and overruled on the ground that the testimony was that a part of the purchase price had been paid.

MR. CONLEY: I am talking about the agreement itself as such without the extraneous testimony showing that it had been partly performed.

MR. COSGRAVE: Yes, and that statement was made yesterday.

The Witness continuing: Some of those grapes were mine and some I bought. I bought Alicantes and 3 cars of Muscats. I was furnishing him all the Muscats I could get cars for.

MR. CONLEY: That is all. That is our case, Your Honor.

SAMUEL J. KORNBLUM

sworn as a witness for plaintiff, pursuant to the provisions of Section 2055 of the Code of Civil Procedure of the State of California, testified as follows:

I came to Fresno about the time this contract was made in June, 1922, and was here throughout that season. I made no arrangement with Mr. Emerzian about buying these black grapes. He offered every

(Testimony of S. J. Kornblum.)
once in a while a car of grapes that he loaded and we looked at them, and we agreed upon a price and I paid him for such grapes as he offered me right along. I heard Mr. Emerzian's testimony about the slip of paper. I can't recall writing on a piece of paper. I don't remember writing "Emerzian to take $5 a ton less if the price falls at the time of delivery" on a slip of paper. I don't remember writing anything. I don't remember any agreement with him about 15 cars of black grapes and Muscats too as well. After October 23d Emerzian offered to sell me a car of black grapes. I think it was a car of petit syrahs. I can't remember if Karl Emerzian or Mr. Maljan offered me the bill of lading that you show me on November 8th. There wasn't any grapes offered to me on November 8th. Bill of lading for car No. 14510 Muscat grapes may be one of the cars that was offered to me. This one here is evidently one of the two cars that was advanced, I mean that were tendered to me. I said yesterday afternoon the 29th or 30th of October but it might be two or three days later. The bill of lading of Southern Pacific Company, Car No. 11301 dated November 3d was not offered to me. It is a common custom among shippers to accept bills of lading consigned to the shipper providing that the bill of lading is properly endorsed afterwards. Whenever Mr. Emerzian tendered me a bill of lading that was consigned to him I would not pay him a check unless it was endorsed to me. I don't know whether the bill of lading of the Atchison, Topeka & Santa Fe for Car No. 10466 shipped No-

(Testimony of S. J. Kornblum.)

vember 3d, 1922, was tendered to me or not. I said yesterday that no cars or bills of lading were tendered to me after the two that were tendered on the 29th or 30th of October. Now I say I don't remember whether this particular car was tendered to me or not.

(Witness gave the same testimony with reference to Car AT & SF 12648, 15650 SFRD, Car No. 2291 shipped on October 18th Malagas, Car No. 11701 Petit Syrahs shipped October 20th, Car No. 2589 Malagas shipped October 25th, Car No. 12767 Malagas shipped October 26th.)

The witness continuing: I made statements the first part of the contract that Mr. Emerzian was doing very well in supplying me cars of grapes under the contract. He delivered to me at the rate of three or four a day in the beginning. When the market got to be $65 he delivered to me a car maybe in three days and I asked him why he didn't deliver he says he can't get no cars. He says "Your contract has no date. Now you just hold your shirt on and you will get your grapes." The car shortage was not unusual. At that time of year the car shortage develops. Of course everybody ships at once. I don't know that the car shortage of 1922 was unprecedented. It occurs every year that people were not getting one-fourth of the number of cars that they want. It occurred this year. I first complained to Karl Emerzian as soon as he stopped giving me the cars. That was as soon as the market went to $60, then the cars was not to be gotten. He began delivering to me the first of September. He gave me

(Testimony of Karl Emerzian.)
two or three cars on the 4th of September, 2 on the 5th, 3 on the 6th, 2 on the 7th, 1 on the 8th, 9th, 10th, 13th, 14th, 15th, 16th and 19th, 3 on the 20th, 1 on the 21st, on the 23d, on the 25th, 26 and 27th, 2 on the 28th and 1 on the 30th, 1 on the 1st of October, 1 on the 4th, 2 on the 5th and 3 on the 6th, 1 on the 7th, 1 one the 8th, 1 on the 11th, 2 on the 12th, 2 on the 13th, 1 on the 14th, 1 on the 16th, 1 on the 17th and on the 19th and on the 22nd. I didn't know it was impossible for him to deliver me 3 to 5 cars a day throughout the time. There was nothing impossible. People were shipping 25 and 30 a day. I don't know that the only people who shipped 25 a day were the big fruit companies. He didn't give me a fair percentage of cars during that year.

KARL EMERZIAN

sworn as a witness in his own behalf, testified as follows:

I started shipping to Mr. Kornblum about the 1st of September. I ordered every three or four days from the Santa Fe and I was trying to get every day all the cars I can to deliver as fast as I can to Mr. Kornblum. As soon as I had one or two or three bills of lading or four or five sometimes I would go to Mr. Kornblum and I would deliver him the bills of lading and he would pay me for them. Once in a while he would inspect the cars. He always asked me how is the car and I would always tell him and he accepted it.

There was a little rain sometime in September that

(Testimony of Karl Emerzian.)

year. I gave him off the Minkler ranch 40 cars the whole season. That is all I could get. I gave him 7 cars from the Tagus ranch the way I agreed. He took those 100 tons of Muscats from the Tagus ranch. The Tagus ranch is on the Southern Pacific. The Minkler ranch is on the Santa Fe. I took Mr. Kornblum out to the Minkler ranch and to Camp Five and I showed him the grapes and we agreed right there that is where he was going to get most of his grapes except 100 tons. I took him to the Nevills ranch and he says he don't want those grapes. Minkler has two ranches, Minkler and Camp Five. One belongs to Emerzian Brothers, the other place to Karl Emerzian. I told him I will sell the K. Emerzian and not Emerzian Brothers and he was satisfied and bought those grapes and that is where I made all my deliveries as fast as I had cars.

Mr. Kornblum never said one word respecting the lack of cars or my failure to deliver grapes until the 23d of October. On October 23d he said "Now the market is shot to pieces and I am not going to take any more grapes. I am going to lose if I take them." Prior to that he never at any time said "Here, you are shipping these grapes to somebody else."

Respecting the black grape contract on the 5th of October, Mr. Kornblum came down to the Minkler ranch and he found me and he wants to get some black grapes and told me what he would pay for them and how many cars he wants. So I told him how much he could buy it for. He says "I will buy so many cars of the different varieties and the different prices, and he

(Testimony of Karl Emerzian.)
says "Have you got any paper?" I say No but I had some bank slips and he took the bank slips and wrote on the back of it, I mean bank checks, and stated that he buys so much black grapes for different prices, also Muscats. He wanted some more Muscats than what I have because his market looks good. He says "I want to get all I can buy" and below he wrote "If black grape market price comes down then Emerzian should take $5 a ton less." Then I asked him for some money and he says "Karl, why can't you take $3000 and apply on this contract the money you got off of me of the $10,000." Then I says "All right, Mr. Kornblum." "Well" he says "When are you going to give me cars?" "Well" I says, "as soon as I can get cars you will get them. I says "you know the car condition." 15 cars were mentioned at that time. I recall the number of the different varieties. It was 2 Alicantes, 3 Missions, 7 Zinfandels and 3 Muscats. The figures spoken of was Alicantes $180, Missions $150, Zinfandels I think was $140 or $130. I don't exactly know which and the Muscats $80. I gave that memorandum to you, Mr. Cosgrave, and don't know where it is at the present time. It was a half of a bank slip and I have not seen it since about a year ago. It was entirely in Kornblum's handwriting.

I got those grapes for Mr. Kornblum and gave him 3 or 4 cars out of the 15. I loaded cars and offered them to him and he refused to take them. According to our agreement I was to get these as soon as I can

(Testimony of Karl Emerzian.)

get cars. He says "We have got plenty of time, any time, just so you give them to me." I loaded 4 and he refused to take them. After that I turned them over to Pete Maljan and says "Sell them wherever you can sell them to the best advantage." I couldn't give the grapes away so I turned them over to Mr. Maljan and I says "See what you can get out of these cars." I don't know where he shipped them. He has got the figures for them. They were 1 of petit syrahs, 2 of Missions and 1 of Zinfandel. I made no tender of the remainder because he refused to take them every time I got a bill of lading so I got tired of it. He says "I don't want to have anything to do with them. The market is gone, I am done." This took place after the 26th of October.

I never made any statements to Mr. Kornblum on the 18th that I would not deliver any further cars to him. He was anxious to know how many cars I can give him. I told him, "Mr. Kornblum, you know the car condition." "I had 4 or 5 cars ordered and some days I don't get any, for two days I don't get any, but as fast as I have cars you will get all the grapes I have on the ranch to give you. It is too late to dry them and I will give them to you as fast as I can get the cars from the Santa Fe." It was pretty close to 500 tons on the Minkler ranch at that time. I could have given him box cars but he didn't want them. I didn't sell any of the grapes on the Minkler ranch to anybody else. From my individual ranch that season I never sold any grapes but to Mr. Kornblum. I am

(Testimony of Karl Emerzian.)
interested in 4 ranches with my brother, the La Favorita, the Biola, The Tagus and Mt. Campbell. One ranch has 100 acres of Muscats and another ranch has 140 acres of Muscats and the Tagus has 40 acres of Muscats, 280 acres of Muscats all told. The fourth ranch has no Muscats. My brother and I sold 8 cars to persons other than Mr. Kornblum and part of that was Malagas, mixed. It would make about 5 or 5½ cars of Muscats. Mr. Kornblum knew that we sold these 8 cars. He knew that was not his grapes at all. He never made any objection. He bought one car himself off of that vineyard through Pete Maljan. Then as soon as the 23d begins, he refuses to take the bill of lading from Mr. Maljan.

The facts are that I sold no Muscat grapes from my own vineyard that I owned individually to anybody other than Mr. Kornblum. From the other ranches, being a total of 280 acres of Muscats, that I owned in association with my brother, I sold a total of 8 cars about 5 of which were Muscats.

4 bills of lading for Muscats were tendered to Mr. Kornblum of grapes from the Minkler ranch after October 26th. They are car No. R. D. 12648, 14510, 10328 and 10466. When I offered these to Mr. Kornblum he refused to take them and said "The market is no good, I am going to lose money and I don't want them." That is the only reason he gave.

My son was in charge of the picking of grapes at the Minkler vineyard. His name is Ed. Emerzian. On this Minkler ranch the vines are 3 feet high from the

(Testimony of Karl Emerzian.)
ground. You don't see many of those in the country. I bought these from the wine association and they were 3 feet high. They were originally planted for wine grapes. The ordinary Muscat vine is low and the grapes are low. On the kind of vines I have described the grapes would hang a couple of feet from the ground. I couldn't see any damage on those grapes at all from the rains. They were fit for Eastern shipment at that time. Even if a bill of lading is made to me in case I sell it I go to the railroad company and divert the cars to whoever I give them to and sign my signature. That is the custom of the trade. There is nothing in question about it or difficulty.

Cross-Examination

The Witness testified: The cars of grapes that he refused were not damaged by rain. They were fit for Eastern market. I considered them sound, first-class grapes. They were all alike. There was no difference in them. Grapes that I offered him afterwards were the same kind of grapes that I offered him on the 27th and 28th. They were not damaged at all. They looked all about alike. They were merchantable grapes, I am certain about that.

The conversation about the written memoranda occurred on October 5th or 6th. The memorandum was dated at the bottom. I can't tell for sure. The memorandum said so many cars of grapes for so much price and stating the cars and prices, also if the price of black grapes go down Mr. Emerzian should take $5 a ton less for the black grapes. I didn't sign it and Mr. Kornblum didn't sign it. He wrote it. It was in

(Testimony of Karl Emerzian.)

his own writing. He agreed that I should transfer $3000 from the Muscat money advanced to the black grapes. That was not on the memorandum. There were 2 cars of Alicantes on that, next 7 cars of Zinfandels if I am not mistaken there were 3 cars of Missions and 3 cars of Muscats. Missions and Petit Syrahs are called the same thing. We both agreed on the price. The price of Alicantes was $180, of Missions $150, Zinfandels $130 or $140. I don't know what the market value was at that time. It varies. After the 26th you couldn't give them away. Up to the 26th I don't know what the price was, what they were worth. Notwithstanding Kornblum had 70 cars of Muscats coming under his contract, on October 5th he entered into a contract with me to take additional cars of Muscats at $80 a ton. He told me if I can get more he will buy them. I was going to give him all I had and did give him all I could get cars for. He told me if I could get more Muscats at $80 than the contract, he will buy them. At that time my brother's grapes were on the trays all of them. At the time Mr. Kornblum breached his contract, I had 500 tons of Muscat grapes that I could deliver him. I kept them for my contract. He came and asked me and says he wants to buy more Muscats and I went and bought them elsewhere for him and gave them to him at $80 a ton. I bought it from a Japanese because I just had enough to fill my contract of the 100 cars. The balance on my own ranch at Camp Five.

(Testimony of Karl Emerzian.)

Mr. Kornblum never said to me "Well, now, I want you to relieve me from this contract." He asked me how many more cars I can get. I says "All the cars I can get from the railroad I will fill and give them to you." He says "Are you sure you can give me 15?" "Well" I says "I can give you 15 and more when I can get cars."

When I first entered into the contract, I took him all around to these different vineyards and finally went out to the Minkler ranch and to Camp Five and said "Now Emerzian Brothers own this other place but this is mine and I am going to give you the grapes right from here" and we agreed upon it then, that all the grapes he was going to get were to come from Camp Five and from the Tagus ranch 100 tons, that means about 6 or 7 or 8 cars. I completed my contract with him as far as the Tagus ranch was concerned. It was the distinct understanding with him that the balance of the grapes were to come from Camp Five, Minkler ranch. I never made any suggestion at the time that he incorporated in that contract that these grapes were to be taken from the Minkler ranch, there was no such thing talked. He was anxious to know how many cars I can give him right away. I told him as soon as I get reefers and ice cars I will give them to him. He says "Can you give me 15?" I said "Mr. Kornblum, I will give you 15 and more. I will give you all the railroad company will furnish me cars for." He says "If I know you are going to give me 15 cars sure, all right." "Well." I says, "I am going to give you

(Testimony of Peter Maljan.)

all." I says "Why do you want to make a contract for the 15, you are getting every pound of grapes coming off of that ranch and you will get them." I never sold a bunch to anybody He was anxious to put in 15 cars and make me sign it. I didn't say that he wanted to get out of his contract. I don't know what was his idea. He says "Are you sure you can give me the 15 cars in a short time?" I says "If the railroad company gives me the cars I will give them to you." He never said a word about 90, 80, 60 or 50. He wanted to put in 15 cars and I says "No, I wont sign any contract like that." I says, "I am going to give you 15 and all I got on the Minkler ranch as soon as I get cars to load them."

At the time I presented the bills of lading I didn't know that Kornblum had made a demand on me for $25,000 and for the return of the deposit. I never got any letters from Mr. Schary asking why I was not making deliveries. I took out the bills of lading on November 1st and 2nd in the name of Emerzian because Mr. Kornblum refused to take them. I billed them to him after he refused to take them because I might have thought he will take them. On the ranch at Biola I raise 160 acres of Thompson seedless, a few figs and some apricots. I put in an order for a car at Biola and I didn't get it for the Thompsons.

PETER MALJAN

sworn as a witness for defendant, testified as follows:

My name is Peter Maljan. I was broker for Mr Emerzian in 1922. Respecting the bills of lading for

(Testimony of Peter Maljan.)

cars delivered at Minkler on November 2, November 3, November 5 and November 8, Car No. 12648 on November 2nd was consigned to Steinhart & Kelly of New York. It brought red ink, $46.50 less than the freight. It was sold on consignment but didn't bring the freight charges. Car No. 10466, November 3d, went to New York to Steinhart & Kelly and there was received for that car $152.95. 14510 was sold in Philadelphia by A. Cancelmo. It was billed there but it was diverted later from there to New York and it was finally sold in New York by Steinhart & Kelly and it netted $17.80. The car grossed $980. Car 10328 on November 8th was consigned to Sweeney-Lyons, Boston. It was sold at 78 cents a box and netted $120.46. Car 11701 from Minkler went to New York and it was handled by Steinhart & Kelly and grossed $1632.00. It netted $685.32. Car 15650 is Zinfandel from Minkler, sold by A. Cancelmo, Philadelphia, and received $821.44 net for the car. It was billed out on October 28th.

(Defendant now offered in evidence his schedule of deliveries admitted by Mr. Kornblum in his examination and the same was marked "Exhibit H" and is in words and figures as follows:

Date	From	To	Car	No.	Bxs.	Weight	Muscats	Malaga	Mission	Petit Seriat	Alicanti
9/2	Minkler	N Y	R D	#3365	1048	24193#	604.32				
4	"	Jersey City	" "	10489	1096	30688	777.20				
4	"	" "	" "	10701	1088	28512	712 80				
4	"	" "	" "	9057	1088	27361	684 02				
5	"	" "	" "	6314	1056	26399	659 97				
5	"	" "	" "	8121	1096	27389	684 72				
6	"	" "	" "	3934	1056	26358	658 95				
6	"	" "	" "	9229	1088	26859	671 47				
6	"	" "	" "	10842	1088	27055	676 37				
7	"	" "	" "	10845	1096	27606	690 15				
7	"	" "	" "	7731	1088	27268	681 70				
8	"	" "	" "	16715	1088	29145	746 12				
9	"	" "	" "	7164	1188	32224	805 50				
10	"	" "	" "	15352	1224	32225	805 62				
13	"	" "	" "	9289	1224	32502	812 55				
14	"	" "	" "	17091	1224	30892	·772 30				
15	"	" "	" "	14263	1224	33331	833 27				
16	"	" "	" "	12253	1224	32666	816 65				
19	"	" "	" "	7934	1233	32430	810 ..				
20	Tagus	" "	PFE	124	1221	28627	715 67				
20	Minkler	" "	R D	13066	1224	32156	803 90				
20	"	" "	" "	6689	1056	27737	693 42				
21	"	" "	" "	6668	1056	28196	703 12				
23	"	" "	" "	15170	1224	33545	838 62				
	Tagus	" "	PFE	5330	1233	25610	630 25				
25	Minkler	" "	R D	9410	1233	32866	821 65				
26	"	" "	" "	10522	1224	32622	816 55				
27	"	" "	" "	8889	1224	33158	828 95				
28	"	" "	" "	7185	1316	35354	883 85				
28	"	" "	" "	7411	1224	33293	832 30				
30	"	" "	" "	7898	1359	36069	901 72				
Oct 1	Tagus	" "	PFE	10844	1233	32959	823 97				
5	"	" "	"	4196	1367	38675	966 87				
6	"	" "	"	17801	1233	27782		1319 64			
6	Minkler	" "	R D	16542	1360	34490			2586 75		
4	"	" "	" "	6359	1320	35085	877 12				
6	"	" "	" "	10106	1360	36650	916 25				
5	"	" "	" "	7403	1360	36375	909 37				
7	"	" "	" "	6285	1360	36590	914 75				
8	Tagus	" "	PFE	2541	1357	33226	830 65				
11	Minkler	" "	R D	16618	1360	35600	890 ..				
12	Tagus	" "	PFE	10794	1367	31516	787 96				
12	Minkler	" "	R D	6328	1320	39399			2954 92		
3	"	" "	" "	8831	1360	35995	899 87				
13	Tagus	" "	PFE	9888	1224	23282	572 05				
13	Minkler	" "	R D	13353	1360	36792				2694 40	
14	"	" "	" "	11809	1361	35860	896 50				
16	"	" "	" "	12731	1360	35500	887 50				
19	"	" "	" "	15434	1360	35980	899 50				
22	"	" "	" "	12352	1360	35410	885 25				
26	"	" "	" "	7946	1360	34790	800 ..	Not paid			
17	"	" "	" "	17030	1360	34697					3122 73
					64213	1661349#	37131 29	1319 64	5541 67	2694 40	3122 73

(Testimony of Peter Maljan.)

This record is short one car load of Muscats.)

The Witness continuing: I don't know anything of an agreement between Mr. Kornblum and Mr. Emerzian for the purchase of black grapes. I do remember a little slip with a memoranda on it. It was in Mr. Kornblum's handwriting. I didn't see him write it. It was on a piece of paper. There was written so many Alicantes I think it was 1, 2 or 3 and so many Zinfandels and giving the price and so many Missions. There were two or three Missions at $150, Alicantes $180 and Muscats $80, 3 cars of Muscats, and underneath was written on it also if the market comes down he would agree to take $5 less a ton. That was all in Mr. Kornblum's handwriting. I recognized it. I didn't hear him and Karl Emerzian discuss it.

There was a very bad car shortage during the season 1922. It is pretty hard to state just exactly what percentage but some days and day after day we couldn't get a car. There was a bad car shortage and a great many grapes rotted on the platform during that season and people were threatening to bring suits against the railroad company for failure to furnish cars. The shortage was most acute in the latter part of September and October and was quite acute about the middle of October. A great many people used box cars instead of reefers. That season you couldn't sell the grapes unless you could get a car to load them in. I had a great deal to do with Mr. Kornblum that season. I don't just remember hearing him complain to Mr. Emerzian about Emerzian failing to give him cars.

(Testimony of Peter Maljan.)

Cross-Examination

The Witness testified: The car shortage became acute between the first and middle of October. There was car shortage along about the 15th and on the 18th of October. There was no car shortage early in September. Muscats ordinarily get ripe in September and can be picked all at once if a fellow wants to pick them that way. I remember the first part of November offering Mr. Kornblum two bills of lading for Muscats. He said he didn't want them. He said the quality wasn't good enough. I didn't see these particular grapes. I never tendered Mr. Kornblum any further bills of lading. Up to the time these 2 cars were refused, Mr. Kornblum had refused to accept another car of Muscats and Malagas mixed but had not refused a straight car of Muscats. I didn't tender all of the bills of lading that had been delivered under this contract for Muscat grapes. Some I did and some Mr. Emerzian did. It didn't make much difference. Some of them I got the checks for and some of them he got himself. He went to the room sometimes. Most all of the invoices were made out and delivered by me to Mr. Kornblum. I do remember of one, I think, that was not. All but two are in my handwriting. My main office at that time was with Mr. Emerzian. I had another office in my room at the hotel. Mr. Emerzian showed me the little memorandum or small piece of paper. We had an argument and that is why he showed it to me. These figures and names of the grapes was all that was on it and there was a writing

(Testimony of Peter Maljan.)
about the $5. I don't remember whether there were any other words.

Re-direct Examination

The Witness testified: In reference to the car partly of Malagas and partly of Muscats from La Favorita that Mr. Kornblum refused, I will tell you. The car was loaded on the 18th. I came to Kornblum and said there is a car to be loaded at La Favorita. There is muscats and malagas mixed. I says "Do you want to buy this car?" Mr. Kornblum says "How much?" I told him $77.50, I think. Then he says "No, I will give you $75." He never saw the car. I says "All right, you bought the car at $75 a ton." It was mostly Muscats. The car was loaded on the 18th and naturally in this case Mr. Emerzian didn't get the bill of lading until three or four days afterwards. There is no agent there and no depot. He gave me two bills of lading, one was that bill and one was petit syrahs, and asked me to collect from Mr. Kornblum. So he was standing right before the Sequoia Hotel. He looked at it and he says "I didn't buy no petit syrahs." This was about the 23d or maybe the 22nd. I took the matter up with Mr. Emerzian and he says "Yes he bought it, he had a contract with me and he bought more other black grapes" and that is the time he showed me that paper. The next day Emerzian and I were talking to one another and Mr. Kornblum came out and they had considerable trouble between them. Finally Kornblum says "All right, I will give you $125 for these petit syrahs and $60 for the other." This was on the 22nd or 23d.

(Testimony of Dick Klemian.)

DICK KLEMIAN

sworn as a witness for defendant, testified as follows:

My name is Dick Klemian. I reside in Fresno. I have seen Mr. Kornblum and don't know him personally. I was employed by Karl Emerzian in 1922 driving a tractor. About the middle of October I heard a conversation between Mr. Emerzian and Mr. Kornblum on the K Emerzian ranch in the neighborhood of Minkler. I heard Mr. Emerzian and Mr. Kornblum talk something about buying black grapes and Mr. Kornblum asked Karl Emerzian to buy him black grapes. Mr. Emerzian asked him $3000 cash to buy black grapes and Mr. Kornblum had told Mr. Karl Emerzian to carry the $3000 from that $10,000 as cash for the black grapes.

Cross-Examination

The Witness testified: That was all I heard. They were not talking before that. I was waiting for Mr. Emerzian to come over there because I wanted some money and when I heard them talk about this deal I didn't want to interfere. So I stood there by the machine until they got through talking. I didn't hear any other talk at that time except what I have related. Mr. Kornblum came up with Mr. Emerzian riding in the machine with him. I was right by the running board. They were talking about buying some black grapes. Mr. Kornblum said he wanted Mr. Emerzian to buy him black grapes. Emerzian said he wanted $3000 in cash. Mr. Emerzian said he would buy them if he

(Testimony of V. Tarjanian.)
give him $3000 in cash. He didn't tell him any certain kind, some Alicante Bouchet I think he wanted. He didn't said Alicante Bouchet, he said black. He didn't say anything about Muscat grapes. That wasn't mentioned. All I heard was black grapes and I don't know what kind of black grapes he meant. I don't know whether any memorandum was written between them at that time. I didn't see Kornblum have any piece of paper in his hand. I could see them both sitting there together. Emerzian then said he wanted $3000 before he would tackle any black grapes.

V. TARJANIAN

sworn as a witness on behalf of defendant, testified as follows:

My name is V. Tarjanian. I live in Sanger and was employed on Karl Emerzian ranch in Minkler in 1922 hauling Muscat grapes. Towards the end of October, 1922, they were good grapes. A little rain had come but they were not spoiled. The vines that the grapes grew on were big vines up pretty high about 2 feet or 3 feet high. I hauled ten or fifteen days after the end of October I guess. They looked to me good grapes. There was some bad stuff or wet stuff I was hauling for the Sanger Winery—some red stuff that was on the platform and some parts of the ranch. Mr. Emerzian told me to take them to the Sanger Winery.

Cross-Examination

The Witness testified: The wet stuff that I hauled was pretty wet. That wet stuff was the top boxes.

(Testimony of C. Tarzian.)
You see they stack them about 8 boxes high and there comes a rain and the top ones get it and Mr. Emerzian told me to take them to the Sanger winery. I took about 300 boxes, some from the ranch and some from the platform. The boxes I took to the winery were wet. As to whether they were rotten I didn't examine them. There was not much rain out there. Sometimes it would be two or three minutes and then stop and then come a little more about two minutes more—a little shower or something like that. I was there on the 27th of October hauling grapes. It rained that day just a little bit. I don't know how many hours. It rained and stopped and then come again. It rained just a little bit on the 28th. I don't know whether it rained on the 1st of November. Some days a little rain come but I don't know whether the 28th or 29th or 30th. There was no frost there at that time. I was not over there when there was any frost.

I ate a lot of those grapes every day. I ate the wet ones and dry ones too. They tasted to me just the same. They looked to me just the same.

C. TARZIAN

sworn as a witness on behalf of defendant, testified as follows:

My name is C. Tarzian. I was loading the grapes at the Minkler ranch in October, 1922. I worked there from October 3d to November 11th. They were Muscat grapes and were not damaged in any way. Along about the 26th and 27th of October the grapes were not injured by rain. They were good grapes.

(Testimony of J. H. Barker.)

Cross-Examination

There was a little rain out there. It didn't wet the grapes. There was some water on the grapes on the platform but not very much. There were some boxes with rain on them. They were rained on in the vineyard. Some of these grapes were taken from the platform over to the winery because they were wet. None of them in the car had been rained on. I put them in. Not a single box had been rained on that was put in there. I picked them out before they were put in there. I don't know what day they were picked. The rain had taken place before those grapes that I put in the car were picked.

Re-direct Examination

In saying they were not damaged I don't mean to say they were not rained on. The foliage on the vines was heavy foliage. The grapes that were on the vines were not damaged by the rain. The grapes I was talk ing about were picked in boxes and exposed. I don't know how long they were in boxes before they were sent to the winery.

J. H. BARKER

sworn as a witness on behalf of defendant, testified as follows:

My name is J. H. Barker. I have lived in Fresno County about 15 years and am now and was in 1922 agent for the Pioneer Fruit Company and was operating in Reedley and in Minkler. I noticed the shipments from the Karl Emerzian vineyard in 1922. I

(Testimony of J. H. Barker.)

was superintending the shipping from the same station where Mr. Emerzian was shipping to Mr. Kornblum. I never saw Mr. Kornblum down there. I noticed some of the grapes shipped in the Kornblum shipments. I remember when there was a little rain in that section and saw some of the shipments after that. The stuff of Mr. Emerzian that I saw was just as good as any of the rest of the stuff that was being shipped. It was the same as the fruit we were shipping and we got state inspection on the fruit we were shipping which was sold f.o.b. and paid for. From my independent knowledge of the business, I would say that whether it was of high-class shipping quality or not all depends on what they are going to use it for. Generally, for general market purposes we shipped our stuff right straight through to the East on f.o.b. orders and it was accepted and paid for.

Cross-Examination

I have been in the business twenty years and was born in Tennessee and have been working for companies that are in the business. Sometimes Muscats and Malagas deteriorate after having been rained on and sometimes they don't. Naturally any kind of fruit Malagas or Muscats, deteriorate when they come in contact with rain. Whether or not they are as fit after a heavy rainstorm as they would have been if there had been no rain depends. Supposing it rains for a couple of hours hard and the sun comes out and dries out the vines, your grapes are not hurt very much. They are not benefitted.

(Testimony of Geo. Hensley.)

From my twenty years experience I have found that when it rains on our Muscats and Malagas and it is succeeded by heavy frosts for four or five days that the grape itself is useless for shipping purposes. After it freezes them up and kills them. After there is a rain and they are frozen or killed and burned up they are not fit for much of anything.

Re-direct Examination

I would generally go out to the district every forenoon and every afternoon. I think it was about the 4th or 5th of November that there was a frost. There was no frost noticeable before that.

GEO. HENSLEY

sworn as a witness on behalf of defendant, testified as follows:

I live in Fresno and am manager of the Minkler Fruit Growers Association and have been since 1920. I was such in 1922. The association is made up of grape growers in the Minkler neighborhood. I live there most of the time and stay there during the busy season. I was there in all of October, 1922. I know the Muscat vineyard of Mr. Emerzian. He is not a member of our association. I couldn't say about all of his vines. There are some high vines but I have never been all over the place.

Respecting rain damage in 1922, we shipped fruit during November up to and until the 30th of November when we shipped our last car. Some of the fruit was rain damaged and some wasn't. The locality

(Testimony of Karl Emerzian.)
made some difference. We sorted ours out at the house and we picked out the damaged fruit and packed the good fruit. The foliage of the vines makes a difference in the extent of rain damage. We shipped straight along through October and November. We sorted all of the grapes after the 1st of November and sorted some all through the season. We shipped some of what we call juice grapes. They are bought for juice purposes. These we did not sort out. They were the vineyard run. I would say that the grapes we shipped of vineyard run were suitable for shipment.

Cross-Examination

They were suitable for juice. That's what we sold them for. We shipped lots of them to the Eastern market. We have table grapes and then we have juice grapes and the table grapes we either sort in the field or else we sort them in the packing house. The fact that rains had come, it is not true that the only reason we sorted them was because rains had come and made it absolutely necessary. We sorted them all the season and sorted just the same after the rain as before.

Here defendant rested.

KARL EMERZIAN

recalled as a witness for plaintiff, pursuant to the provisions of Section 2055 of the Code of Civil Procedure of the State of California, testified as follows:

At the time that I offered the bills of lading for 4 cars to Kornblum, the cars were rolling in his name.

(Testimony of S. J. Kornblum.)

Cross-Examination

by Mr. Cosgrave. The witness testified:

The others were the same way. I rolled them before he pays me.

SAMUEL J. KORNBLUM

recalled as a witness on behalf of plaintiff in rebuttal, testified as follows:

I never at any time entered into any agreement or understanding or made any statement to Mr. Emerzian that he would take $3000 off the $10,000 on deposit and apply it on a new and independent contract. I never agreed to take from Emerzian any cars that I refused to take up to the 27th of October, 1922. I never refused any until they were rain damaged.

It is hereby stipulated by and between the parties to this action that the foregoing bill of exceptions is correct in all respects and that the same may be approved, allowed and settled and made a part of the record herein to be used by the defendant upon his writ of error to the Circuit Court of Appeals.

Dated this October 1st, 1924.

Edward Schary
Kenton A. Miller
Lindsay and Conley

Attorneys for Plaintiff

L. B. Hayhurst & Geo. Cosgrave

Attorneys for Defendant

The foregoing bill of exceptions is hereby allowed and settled as correct in all respects and made a part of the record herein to be used upon writ of error to the Circuit Court of Appeals.

Dated this October 10," 1924.

Wm P James

Judge

Settled, allowed, signed and filed this 15 day of October, 1924.

Chas N. Williams

Clerk

By R S Zimmerman

Deputy Clerk

[Endorsed]: No. 152 Civil IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division S. J. KORNBLUM etc. Plaintiff vs. KARL EMERZIAN Defendant. (Engrossed) BILL OF EXCEPTIONS FILED OCT 15 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk. L. B. HAYHURST GEO COSGRAVE MATTEI BLDG. FRESNO, CALIF. ATTORNEY-AT-LAW for defendant

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IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

. . . .

S. J. and WILLIAM KORNBLUM,) Civil No. 152.
a corporation,)
Plaintiff,)
vs.) OPINION.
KARL EMERZIAN,) - - - - - - -
Defendant.)
)

. . . .

Edward Schary; Lindsey & Conley; K. A. Miller: Attorneys for Plaintiff.

L. B. Hayhurst; Geo. Cosgrave: Attorneys for Defendant.

. . . .

Plaintiff sues to recover damages for the alleged failure of defendant to deliver fifty-two carloads of muscat grapes during the season of 1922, including the unused remainder of deposit money. A contract in writing was made on the 20th of June of that year, at Fresno, California, which recited that plaintiff, a corporation, agreed to buy, and defendant agreed to sell, one hundred cars of muscat grapes at Fifty Dollars per ton, loaded in refrigerator cars. Other conditions of the contract are not in dispute; hence they need not be particularly set out.

Pursuant to a condition of the contract, the plaintiff advanced $10,000 to the defendant, from which

deposit $100 was to be deducted for each carload of grapes delivered, and the balance of the agreed price of each carload was to be paid by the plaintiff on delivery of the bill of lading. The deliveries of grapes began the 1st of September, 1922, and continued up to about the 22nd of October, at which time forty-eight cars in all had been delivered and were paid for. Deliveries were made of approximately the same number of cars per week throughout the entire period. For instance, from the 1st to the 10th of September the average delivery was one and two-fifths cars per day; from the 10th to the 20th of September, four-fifths cars per day; or an average for the first twenty days in September of one and one-tenth cars per day. From the 20th of September to the 10th of October the average was nine-tenths cars per day. The market price—that is, the wholesale price—of grapes at and about Fresno, of the kind and quality, and delivered under like conditions as specified in the contract between the plaintiff and defendant, varied considerably from September 1st to October 23rd. There was not a great difference in the testimony on this point—that of S. J. Kornblum, for plaintiff, agreeing in the main with that of other witnesses. From that testimony the following average prices may be calculated:

From September 1st to 10th, $38.70 per ton;
From September 10th to 20th, $56.25 per ton;
From September 20th to October 1st, $67.50 per ton;
From October 1st to October 10th, $76.25 per ton;
From October 10th to October 15th, $77.50 per ton;

From October 15th to October 18th, $86.25 per ton. The average price covering the whole period during which deliveries were made was $67 per ton. One witness testified that he knew of a single car that sold as high as $100 per ton, but this seems to have been a case of an isolated single sale, which should not be considered in ascertaining the general market price. The contract contained a condition that the seller would not be responsible for deliveries "in the event of strikes or car shortage", but as the defendant has not pleaded as excuse for non-delivery a shortage of available cars, it must be assumed that sufficient cars could have been obtained to have shipped all of the grapes required to be delivered under the contract during the 1922 season. The contract was made for that season and it must be assumed that it was made with full knowledge of climatic conditions and with an understanding as to possible damage that grape crops might suffer because of a change in weather conditions. The defendant did not protect himself against any shortage of fruit which might be occasioned by damage done by the elements, but agreed unconditionally to deliver one hundred cars of grapes suitable for eastern shipment, which required that the fruit be of thoroughly sound condition. His defense is that, notwithstanding that he had the grapes and was ready to deliver them, the plaintiff refused to accept more deliveries after about October 22nd. The evidence satisfactorily establishes that in the locality where the grapes were produced a general rainstorm occurred on October 27th, when rain fell to the

amount of over one-half of an inch, and that the condition of all muscat grapes in the fields was affected so as to make the fruit unsuitable for eastern shipment. All of the tenders of cars of grapes shown to have been made by the defendant, occurred after this storm of the 27th, and it must be concluded that plaintiff was justified in refusing all offered deliveries of grapes after that date. Plaintiff testified that he was constantly asking for faster deliveries after the time that defendant commenced to deliver under his contract, and that the defendant insisted that his contract did not require any specified quantity at any particular time. It appears that the plaintiff bought from other persons and at higher prices the same class of grapes during the same season, which tends to corroborate his statement that he was urging that deliveries be made in larger quantities by the defendant.

It has already been noted that the defendant contracted with the presumed knowledge of the length of the shipping season. The likelihood of rain occurring in October was therefore a thing that he had notice of, and if he chose to delay his shipments until the time of the year had arrived when damage was likely to be caused by rain, he took the risk of having to make the buyer whole for damage suffered by failure of deliveries for that cause. It must be assumed that, as the buyer was ready to receive and pay for the grapes as fast as they could be delivered, plaintiff might have made full delivery under his contract before any rain fell. Defendant has insisted that, as it was shown that there was a sudden drop in the grape

market on October 23rd, plaintiff's real reason for rejecting the grapes was because of the unstable condition of the market rather than that the grapes were not of good quality. No definite reason has been given in the testimony to show why the eastern market for grapes suddenly fell off on October 23rd. It is as reasonable to conclude, as to assume anything different, that that was due to the fact that the rainy season was approaching and Eastern buyers were not willing to run the risk of purchasing damaged grapes, for on October 2nd there had been a shower of rain in Fresno County.

All of the evidence considered, with the attending circumstances, I am of the opinion that the state of facts as represented by the plaintiff's testimony is supported by more corroboration than is that of the defendant. In that view it might be here concluded that plaintiff is entitled to judgment, were it not for the fact that defendant claims that the original contract was modified so that he was required only to deliver fifteen cars in addition to the forty-eight which the plaintiff received. He asserts also a counterclaim under which he charges that the plaintiff agreed to buy separately several cars of other varieties of grapes, and alleges that plaintiff agreed that $3,000 of the deposit money should be applied on account of that purchase. As to the counter-claim the evidence does not satisfy me that the contract as alleged therein was entered into.

The alleged modification of the contract was in the form of a written memorandum and was made on October 18th. That writing was as follows:

> "I hereby agree to accept on the one hundred cars muscats to be loaded in refrigerators as per contract. Up to present time he, K. Emerzian, already delivered 45 car. K. Emerzian agrees to deliver 15 more cars anyhow, or if there is more on Minkler Ranch Camp Six he must give to me or deliver."

I do not think either that any consideration is shown to have been rendered for the execution of this alleged contract, and, further, that assuming it to be valid and binding, it did not relieve the defendant from furnishing the grapes required under the original contract, for he had the duty to furnish at least all of the grapes that were on the Minkler Ranch and he admitted in his testimony that there were plenty of grapes remaining on that ranch at the time the rain came. To remark again, no excuse is offered for non-delivery based on the ground of shortage of grapes or shortage of cars. However, on the question of consideration, I do not think that there could have been one to support this second agreement, unless the specification that the grapes should be delivered from the Minkler Ranch furnished it. The defendant, however, testified that from the beginning it was contemplated in the main that the Minkler Ranch grapes would be those used in filling the contract requirements. Referring to the preliminary negotiations had at the time of the making of the first contract, defendant testified that he showed Kornblum different ranches and stated: "I took Kornblum to Minkler and we agreed that there was where he

wanted his grapes." So, if this testimony of the defendant is true, the reference to Minkler in the second memorandum added nothing to the general understanding that was had at the time the first contract was made. But to again repeat: This supplemental agreement did not relieve the defendant from delivering the full amount of the grapes required under the terms of the first contract—if he had them—and according to his own testimony he did have them in sufficient quantity to fully perform his obligation.

The rule of damages is, I think, correctly stated by plaintiff's counsel to be that expressed in Sections 3308, 3309, Civil Code of California (See also Vol. 24, Ruling Case Law, page 72, on general subject); that is, damages would be the excess of the value of the grapes to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled. I think that under a contract of the kind here considered, where deliveries were to be made from day to day covering a fruit season, the value to the buyer would not be expressed by the high price that might have been obtained for a single car of fruit during the period, but that an average price should be adopted. The cars contained an average each of fifteen tons. The fifty-two cars as to which the defendant was short in his deliveries would have contained 780 tons. The difference between the price agreed to be paid, to-wit, $50 per ton, and the average price of $67, would be $17. The loss to the plaintiff, therefore, being $17 per ton, the total amount would be $13,260. In addition to this, plaintiff would be entitled to recover

the unapplied portion of the deposit money, amounting to $5200.

Findings will be prepared accordingly, upon which the Clerk will enter judgment.

Dated April 17, 1924.

Wm P James

District Judge.

[Endorsed]: No. 152 Civil. U. S. District Court, SOUTHERN DISTRICT OF CALIFORNIA. NORTHERN DIVISION. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff. vs. KARL EMERZIAN, Defendant. OPINION. FILED APR 17 1924 CHAS. N. WILLIAMS, Clerk Murray E Wire Deputy

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

*__*__*__*__*__*__*__*__*

S. J. KORNBLUM and : No. 152 Civil
WILLIAM KORNBLUM, *
a corporation, :
Plaintiff, * NOTICE OF MOTION
vs. * FOR NEW TRIAL
KARL EMERZIAN, :
Defendant. *
:

*__*__*__*__*__*__*__*__*

To plaintiff above named and to Edward Schary, Lindsay & Conley and K. A. Miller, its attorneys:

You will please take notice that defendant in the above entitled action intends to move the above entitled court that the judgment and decision heretofore made and entered in said action be set aside and vacated and a new trial of said action be granted.

Said motion will be made upon the following grounds:

1. Irregularity in the proceedings of the court and abuse of discretion by which defendant was prevented from having a fair trial.

2. Accident and surprise which ordinary prudence could not have guarded against.

3. Excessive damages.

4. Insufficiency of the evidence to justify the decision and that it is against law.

5. Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made upon the minutes of the court and upon affidavits to be hereafter served and filed.

Dated this May 12, 1924.

Geo. Cosgrave
L. B. Hayhurst

Attorneys for Defendant

[Endorsed]: Due service of the within notice admitted and receipt of copy acknowledged this May 12th 1924 Lindsay & Conley & K. A. Miller and Edward Schary Attorneys for Defendant No. 152 Civil IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR

SOUTHERN DISTRICT OF CALIFORNIA Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs. KARL EMERZIAN, Defendant. NOTICE OF MOTION FOR NEW TRIAL FILED MAY 12 1924 Chas. N. Williams, Clerk GEO. COSGRAVE Mattei Bldg. Fresno, Calif. ATTORNEY-AT-LAW

At a stated term, to-wit: The May Term, A. D. 1923 of the District Court of the United States of America, for the Northern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the Thirtieth day of June, in the year of Our Lord one thousand nine hundred and twenty-four.

Present:

The Honorable Wm P James District Judge.

S. J. and)
William Kornblum,)
a corporation,)
Plaintiff) No. 152 Civil, N. D.
vs.)
Karl Emerzian,)
Defendant)

This cause coming before the court at this time for hearing on motion for a new trial; W. M. Conley, Esq., appearing as counsel for the plaintiff; Geo. Cosgrave, Esq., appearing as counsel for the defendant, said Geo. Cosgrave, Esq., argues in furtherance of motion for

new trial and W. M. Conley, Esq., having thereupon argued in opposition thereto, said Geo. Cosgrave, Esq., argues further in reply in support of motion; now, it is by the court ordered that said motion for a new trial be denied and that an exception be noted for the defendant. Order heretofore signed in the matter of time to file Bill of Exceptions.

M E W

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
Northern Division.

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*__*__*__*__*__*__*__*__*

S. J. KORNBLUM and	:	No. 152 Civil
WILLIAM KORNBLUM,	*	
a corporation,	:	
Plaintiff,	*	ASSIGNMENT OF
vs.	:	ERRORS
KARL EMERZIAN,	*	
Defendant.	:	

*__*__*__*__*__*__*__*__*

Comes now defendant above named and files the following statement of errors upon which he will rely upon his prosecution of the writ of error in the above entitled cause, petition for which writ is filed at the same time with this assignment.

1.

The court erred in overruling the objection of coun-

sel for defendant to the following question which was asked of Karl Emerzian, a witness for the plaintiff, upon his examination by counsel for plaintiff pursuant to the provisions of Section 2055 of the Code of Civil Procedure of the State of California:

"Q The 1st to the 10th day of October, what was the reasonable market value of Muscat grapes delivered here in refrigerator cars in Fresno, or I will make it the San Joaquin Valley, at that time?

A From $60 to $75.

Q What were they worth from the 10th day of October until the 20th?

MR. COSGRAVE: We object to that, if the Court please, as being immaterial, at least at this stage of the case. There has been no breach shown at the present time, at least prior to October 26th, and therefore the price of Muscat grapes at a time prior to that is immaterial at this stage of the evidence.

THE COURT: It might be some evidence leading up to it, showing his general familiarity with the market. It might be some evidence."

Exception.

Q BY MR. CONLEY: .... What was the market value between the 10th and the 20th of October?

A From $60 to $75 a ton.

2.

The court erred in overruling the objection of counsel for defendant to the following question which was asked of S. J. Kornblum, a witness for the plaintiff:

"Q. Mr. Kornblum, you have been sitting here lis-

tening to the testimony of Mr. Emerzian. I don't want to ask you any questions about it, but I want you to tell this court what took place in your room upstairs and what led up to it and all that occurred there.

MR. COSGRAVE: If the Court please, it seems to me that that evidence is not material. Evidently there is enough before the Court to show that there has been a written agreement signed between these parties. What led up to that I should think is entirely immaterial. There is nothing in the pleading to warrant the conclusion that it was the result of coercion or anything of that sort. There is no claim made of that kind. Therefore it supersedes whatever written agreement there was before, and also the oral negotiations of the parties.

THE COURT: I suppose anything that occurred between the parties by way of a dispute or a claim for failure and a denial of delivery, and all of those things, must be ventilated here in order to get at the facts of this controversy. Grapes are admitted not to have been delivered in full performance of the contract, and the question is why, and I suppose the only way to get at it is to find out what happened between them during that time.

MR. COSGRAVE: We make the specific objection on the further ground that it appears from the evidence in this case that the negotiations the witness is about to describe resulted in a new contract.

MR. CONLEY. We might call the Court's attention to the fact that it is alleged right in Paragraph VII of the complaint. We have alleged they failed,

refused, and neglected to deliver the other 52 cars, and we want to show why this was done.

THE COURT: Objection overruled.

Exception.

"Q. BY MR. CONLEY: Mr. Kornblum, take your time and state all that you remember that occurred up in that room and how you happened to go up there, and all about it.

A I remember it was on the 18th day of October; in fact I remember it was that date because I see the paper was written on the 18th of October. I came in that night into the lobby and he said, "I got to talk to you and we better come upstairs to your room." And I did go up with him, and I came in. We were both in the room and he said. 'You better lock that door. I don't want no interference. Somebody may come in.' I says, 'What is it all about?' So he said to me, 'You know you are not going to get 100 cars of grapes'—100 cars of Muscats. I says, 'I didn't know that Mr. Emerzian. That is the first time, your telling me.' I says, 'Why ain't I going to get 100 cars of grapes?' 'Well', he says, 'In the first place you overloaded these cars. You loaded so many more in these cars than I would have given you in ordinary cars.' I says, 'According to the contract we have no specifications as to how many you are going to put in the car, and the cars being scarce we want to load them all we can.' I says, 'That is to your benefit.' He says, 'No, sir. I could get $1000 more for some of these cars.' 'Well,' I said, 'you couldn't get that when I took them at $40, a thousand dollars more, and you

didn't object to that.' I says, 'Why do we want to quarrel now about that? Give me all you can. Go right on and give me as many as you can, but give me these cars that you are loading somewheres else.' So then I told him, 'Well, all right, I will reduce that 10 cars; I will make it 90 cars from the fact that you overloaded these cars.' 'Oh, no; I will not give you no 90', he says. 'Well,' i says, 'how many do you want to give me?' 'Well,' he says, '60 cars is all I am going to give you. That is 15 more.' So I says, 'Why, that is ridiculous. I can't accept 15 more cars.' I says, 'I can make $55,000 more and you are just going to rob me out of $55,000." I says, 'I was good enough'—or I reminded him then of the fact that this contract was made without any money at all. The wires that he sent back East to me was that the purchase would be without money, and I told him that.' "

3.

The court erred in overruling the objection of counsel for defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

"Q I will ask you this: did any request come from you at any time to reduce the number of cars?

MR. COSGRAVE: Objected to as calling for the conclusion of the witness, if the Court please.

THE COURT: He may answer yes or no and then state what was said.

Exception.

A Positively not."

4.

The court erred in overruling the objection of coun-

sel for defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

"Q BY MR. CONLEY: What was the condition of the grapes that you saw they were loading on the car the next day you were there?

MR. COSGRAVE: Just a moment. I ask that my motion go to all of the evidence of this witness respecting the grapes that he is describing as having been on or about the 29th or 30th of October, for the reason that so far he has not connected a single box of grapes with any that he has received or had tendered to him.

THE COURT: He can testify to what he saw and we will see whether they are connected up as being the same grapes that were tendered to him.

(Exception)

Q BY MR. CONLEY: Just go on.

THE COURT: Just tell what you observed, not your conclusion.

A Yes, your Honor. I observed that the same truck was backed up against the barn, and two or three men put them grapes up from the floor onto the truck. I went away, and then I was in Taylor's packinghouses and I watched and seen that same truck backed up against the car and load these grapes."

5.

The court erred in overruling the objection of counsel for defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

"Q I will ask you, Mr. Kornblum, what was the value of Muscat grapes in this valley f.o.b. refrig-

erator cars from the 1st to the 10th of September, 1922, and all of these questions will be the same.

MR. COSGRAVE: We renew our objection to that, if the Court please, on the ground it is incompetent, irrelevant, and immaterial, and I want to make this suggestion, if it is at all material it is on the ground that there was a breach of the contract. No breach has been alleged, as I understand, or even claimed, prior to the 26th of October.

. . . . . .

THE COURT: ..... I will admit the testimony; and I am willing to hear you further, Mr. Cosgrave, on the argument, as to the application of it.

. . . . .

THE COURT: I will admit the testimony showing the whole range of prices during the whole period, and leave it open for you gentlemen to argue further if you care to.

(Exception)

Q BY MR. CONLEY: State the value from the 1st to the 10th of September, 1922.

A The 1st of September there were quotations at $37.50 a ton f.o.b. refrigerator cars. There might have been just one or two sales, but the general price was $40 on the 1st of September."

6.

The court erred in overruling the objection of counsel for defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

"Q You only bought, as I understood your testimony, 48 cars?

A There were delivered 48 cars, but I had to go outside in the market and pay $85 and $87.50 to supply my grapes.

MR. COSGRAVE: Just a moment; objected to—

MR. CONLEY: That is what I want, exactly.

MR. COSGRAVE: I desire to object to the evidence and have the objection come before the answer, on the ground it is incompetent, irrelevant, and immaterial, and not the proper measure of damages as to what this defendant had to pay for grapes.

. . . . . .

THE COURT: Objection overruled.

(Exception)

Q BY MR. CONLEY: How many cars of Muscat grapes did you buy in Fresno County from the 1st day of September until the season was over, during the year 1922?

A I bought—

MR. COSGRAVE: Let our objection go to all of this testimony.

THE COURT: Yes; and overruled.

A 85 cars.

Q BY MR. CONLEY: Then if my figures are right, in addition to the cars purchased from Emerzian you purchased 37 cars of other Muscat grapes?

A Yes, sir."

7.

The court erred in overruling the objection of counsel for defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

"Q Why did you make these outside purchases? Did you have any reason for it?

A Because I couldn't get them from Emerzian.

MR. COSGRAVE: Just a moment. Our contention is that the measure of damages in this case does not depend on whether this plaintiff went and bought grapes or not.

THE COURT: It is not offered for that purpose. It is a circumstance, only, as tending, if it does, to contradict the witness who has testified in regard to what this witness stated to him.

MR. COSGRAVE: I suggest, if your Honor please, that evidence of this kind might be material on the cross-examination of the defendant, but not in support of or proof of a fact from which an inference can be drawn that he did or did not do a certain thing. It is purely self-serving, so far as the plaintiff is concerned, to show that he went and did a certain thing, and to say that because of that it is probable that the defendant himself was not telling the truth on the witness stand. That is what it means, and I suggest evidence of that kind is entirely irrelevant and immaterial.

THE COURT: I will permit it; overruled.

(Exception)

A I sold grapes on the strength of this contract.

MR. COSGRAVE: And we object on the further ground, if the Court will allow me to do so, that there is no pleading here that these grapes were purchased for any special purpose, and it certainly is the rule of law that in the absence of such an allegation no evidence of this kind is admissible."

8.

The court erred in overruling the objection of coun-

sel for defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

"Q BY MR. CONLEY: After you entered into this contract with Emerzian for the delivery of those 100 cars, did you or did you not enter into contracts with people in the East to deliver them Muscatel or Muscat grapes?

MR. COSGRAVE: We object to that on the ground it is incompetent, irrelevant, and immaterial, and not a proper element of damages in this case, and not within the issues made by the pleadings.

THE COURT: Yes; it is not admitted for the purpose of showing damage, and it is overruled otherwise.

(Exception)

Q BY MR. CONLEY: You may answer the question.

A Yes, sir; I entered into agreements to deliver grapes on the strength of the contract that I knew I had 100 cars, and that I was going to get them when I was told.

MR. COSGRAVE: And we object on the further ground, if the Court please, that evidently this was in writing and the contracts themselves are the best evidence.

THE COURT: Objection overruled."

(Exception.)

9.

The court erred in overruling the objection of counsel for the defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

"Q Mr. Kornblum, I will ask you, after the 18th day of October, 1922, until the 26th day of October, 1922, whether or not you purchased any cars of Muscat grapes from persons other than the defendant in this action.

MR. COSGRAVE: We object to that as incompetent, irrelevant, and immaterial.

THE COURT: The same ruling. It is not admitted for the p*ru*pose of establishing damage, but is admitted for other purposes. Overruled.

(Exception)

A Yes; I bought all I could get.

Q BY MR CONLEY: How many did you get?

A About 20 to 22 cars.

Q What price did you pay for them?

A I paid up to $87.50. I bought them as low as I could. I bought some at $85, and around $87.50. That is the highest price I paid.

Q And what was the purpose of making those purchases?

A To fill my contracts.

MR. COSGRAVE: Of course our objection goes to all of this line of testimony.

THE COURT: The same ruling."

(Exception)

10.

The court erred in overruling the objection of counsel for the defendant to the following question asked of the witness, S. J. Kornblum, upon direct examination:

"MR. CONLEY: . . . . . For the purpose of

enabling the Court to determine the capacity of the cars, we offer as one exhibit all of the manifests that were furnished by the defendant to the plaintiff in the action, and for that purpose only.

MR. HAYHURST: To which we object, if the Court please, on the ground it is immaterial, irrelevant, and incompetent. The mere fact that the cars were loaded in some instances to 15 or 16 tons is no indication of what was the intention of the parties. We think that "a carload" has a meaning that we can show the meaning of the parties by the custom of shippers, and that the railroad company, except in times of extreme car shortage, fixed a capacity to those cars of 12 tons.

THE COURT: Isn't it an indication of what the parties intended by considering what they actually did as far as they went?

Mr. Hayhurst: I suppose that is what it is offered for.

THE COURT: That is a common rule of interpretation, when the parties under a contract have proceeded in a certain way, that that is evidence of what was intended to be done.

MR. HAYHURST: I recognize that rule, your Honor, but I still make the objection.

MR. COSGRAVE: If the Court please, there is an additional element in this: The Court will realize that very shortly or a considerable time after this contract was made and about the time this shipment began there was a very acute shortage of cars, and we expect to show that the parties loaded them to utmost capacity at that time.

THE COURT: That of course might be subject to variation by evidence that you might have to offer. The objection will be overruled."

(Exception).

11.

The court erred in sustaining the objection of counsel for plaintiff to the following question which was asked of S. J. Kornblum, a witness for plaintiff, upon cross-examination:

"Q I say, if they are used for wine purposes they are crushed immediately, aren't they?

MR. CONLEY: We don't desire to make any captious objections, but it seems to me that is argumentative.

THE COURT: Yes; in view of the witness's answer that he had no such knowledge. I will sustain the objection."

(Exception)

12.

The court erred in sustaining the objection of counsel for plaintiff to the following question which was asked of S. J. Kornblum, a witness for plaintiff, upon cross-examination:

"Q Were you here during the past season of 1923?

A Yes, sir.

MR. CONLEY: One moment; if your Honor please, I object to all of this line of testimony, and base the objection upon the allegations of Paragraph II of their answer, and call your Honor's attention to the wording of it.

. . . .

THE COURT: I will sustain the objection."

(Exception)

13.

The court erred in sustaining the objection of counsel for plaintiff to the following question which was asked of S. J. Kornblum, a witness for plaintiff, upon cross-examination:

"Q To whom else, other than to Charles Emerzian, the nephew, did you tell that this contract had been extorted from you?

MR. MILLER: What difference does that make? We object to it.

MR. COSGRAVE: I think it is very important to show whether it came at his suggestion or Karl Emerzian's suggestion.

MR. MILLER: It wouldn't reflect the transaction between the parties. It is immaterial.

THE COURT: I will sustain the objection."

(Exception)

14.

The court erred in overruling the objection of counsel for defendant to the following question which was asked of S. J. Kornblum, a witness for plaintiff, upon re-direct examination:

"Q Did you see any grapes that were fit for shipment to the Eastern markets after that date?

A No, sir.

MR. HAYHURST: That is objected to on the same ground.

THE COURT: Overruled.

. . . .

MR. COSGRAVE: We desire an exception to the rulings, if your Honor please."

(Exceptien)

15.

The court erred in overruling the objection of counsel for defendant to the following question which was asked of Walter Bonnett, a witness for plaintiff, upon direct examination:

"Q BY MR. CONLEY: Refer to your records and tell us what the precipitation was in the months of September and October, 1922.

A In the month of September there was no rain at all at Fresno. In the month of October, on the first day, there was a trace, that is, an amount too small to measure, or at least less than one-hundredth of an inch. On the 2nd day of October there was .01 of an inch. There was no rain then until the 27th, when there was .51. That is all the rain in October.

A What was the precipitation here in the month of November, the first ten days of November?

MR. HAYHURST: Do our objections, if the Court please, and exceptions, go to all of this testimony?

THE COURT: It may be shown.

MR. HAYHURST: We would like the record to show our objections and exceptions to the ruling if the ruling is to be the same.

THE COURT: It is understood that you object to all evidence as to the rainfall for September, October, and November, 1922.

MR. HAYHURST: Yes, sir.

THE COURT: And the objection is overruled and you may have your exception.

(Exception)

"Q BY MR. CONLEY: What was it for the first ten days in November?

A On the 2nd day of November there was a trace; no rain then until the 7th, when there was .12. On the 8th, .09; on the 9th, .29, and on the 10th, .11."

16.

The court erred in overruling the objection of counsel for defendant to the following question which was asked of F. M. Withers, a witness for plaintiff, upon re-direct examination:

"Q What was the price of Muscat grapes from the 1st of September until the 1st of October?

MR. COSGRAVE: We renew our objection to this line of testimony on the same grounds heretofore urged.

THE COURT: Yes; and the objection is overruled.

MR. COSGRAVE: And we take the same exception.

Q BY MR. MILLER: F. O. B. Fresno.

A From the 1st of September to the 1st of October the market started out on Muscats for the season, which is practically the 1st of September, around $37.50 a ton f.o.b. cars, and remained stationary for about a week, from $37.50 to $40. Then the market started to climb, and around the 1st of October the market was in the neighborhood of $60 to $65, a ton, as I recall.

Q From the 1st of October until the 18th of October what did it get to?

A The market kept on climbing on all varieties of grapes which included Muscats, and around the 18th of October the market was very strong, at $85 a ton.

Q What was the highest it got during the season?

A I heard of some sales higher than $85, but I didn't make any myself, so $85 is what I would want to base my figure on."

17.

The court erred in overruling the objection of counsel for defendant to the following question which was asked of E. Y. Foley, a witness for plaintiff, upon direct examination:

"Q Mr. Foley, will you state to the Court what the value of Muscat grapes per ton was from the first day of September until about the tenth day of September, 1922?

. . . .

MR. COSGRAVE: We object, of course, to this line of evidence upon the grounds stated yesterday, that is, that it is incompetent, irrelevant and immaterial and not tending to establish a proper measure of damages in this action.

THE COURT: Objection overruled.

(Exception)

. . . .

A We started selling Muscat grapes in the early part of August forty to forty five dollars a ton. On the 25th of August we sold them at $52.50 a ton. On the 27th of August we sold at $60.00 a ton. On the 29th of August we sold at $62.50 a ton, and the market from the first of August ranged from $62.50 to $72.50 a ton.

MR. CONLEY: You mean September, don't you?

A From the first of September to the 25th of September.

Q You used the term "August."

A I meant September. We did not sell any, however, at $72.50 a ton until the 23rd of September. From that on we sold up to the third of October at $80.00. From the 3rd to the 6th we got $85.00 and I sold a car on the 13th for $100.00 and that was the last sale we made on Muscats."

18.

The court erred in denying defendant's application for leave to amend its pleadings by pleading as a defense to plaintiff's action the shortage of cars existing during the season of 1922, said error occurring as follows:

"Q Do you know generally to what extent or what percentage of contracts such as yours were filled in Fresno County?

MR. CONLEY: We object on the ground it is incompetent, irrelevant and immaterial.

. . . . . .

THE COURT: Do you mean by that what percentage of cars did you get to meet the demand?

MR. COSGRAVE: Yes; that is it.

A 25%.

MR. MILLER: May we offer another objection? The pleadings here allege they were able and willing to furnish these cars, and what difference does it make?

. . . . . .

THE COURT: I will sustain the objection.

. . . . . .

MR. COSGRAVE: . . . . . . It is my understanding, if Your Honor please, that at the time this

answer was drawn that in the first place there would be no question about the change to the 52 cars, but they charge us with a refusal to deliver. We allege that we did not refuse to deliver and I think we are within our rights in showing that we did not refuse to deliver because of this arrangement that was made, or because of the shortage of cars, because that is one of the provisions of the contract 'subject to shortage of cars.' . . . . . . if there is any question about this we would have to suggest an amendment to our answer so as to cover the point . . . .

. . . . . .

THE COURT: I think, Mr. Cosgrave, that your allegation in Paragraph III, where you allege in terms a refusal of the plaintiff to receive any car than the 48 cars is to be construed as being the only excuse that you have for not delivering, that he refused to receive them.

MR. COSGRAVE: That is what I wanted to get at. If that is the view of the Court I would suggest that we will ask leave to make an amendment to it so as to offer on that proposition that there was a shortage of cars . . . .

. . . . . .

THE COURT: Coming at this time it is too late to permit an amendment to raise an issue which would be entirely new to the case and in the midst of the trial, and I think the only way discretion could be exercised without abusing it would be to deny the application, and it is so ordered."

19.

The court erred in awarding judgment to plaintiff.

Dated: July 8, 1924.

L. B. Hayhurst and Geo. Cosgrave

Attorneys for Defendant

[Endorsed]: Due service of the within Assignment of Errors admitted and receipt of a copy acknowledged this July 9th, 1924. Edward Schary Attorneys for Plaintiff No. 152-Civil IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs. KARL EMERZIAN, Defendant. ASSIGNMENT OF ERRORS FILED JUL 14 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk GEO. COSGRAVE MATTEI BLDG FRESNO, CALIF. ATTORNEY-AT-LAW

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Northern Division.

*__*__*__*__*__*__*__*__*

S. J. KORNBLUM and	:	No. 152 Civil
WILLIAM KORNBLUM,	*	
a corporation,	:	
Plaintiff,	*	PETITION FOR
vs.	:	WRIT OF ERROR
KARL EMERZIAN,	*	
Defendant.	:	

*__*__*__*__*__*__*__*__*

Karl Emerzian, the defendant in the above entitled cause, feeling himself aggrieved by judgment entered in the above entitled action on May 5, 1924, and new trial of which cause was heretofore denied on June 30, 1924, comes now by his attorneys, Geo. Cosgrave and L. B. Hayhurst, and files herewith an assignment of error and petitions said court to allow said defendant to procure a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which defendant shall give and furnish upon said writ of error and that upon the giving of such security, all further proceedings in this court be suspended and stayed until the determination of said writ of error

by the United States Circuit Court of Appeals for the Ninth Circuit.

L. B. Hayhurst
Geo. Cosgrave

Attorneys for defendant

[Endorsed]: Due service of the within Petition for Writ of Error admitted and receipt of a copy acknowledged this July 9th, 1924. Edward Schary Attorneys for Plaintiff No. 152 - Civil IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs. KARL EMERZIAN, Defendant. PETITION FOR WRIT OF ERROR FILED JUL 14 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk GEO COSGRAVE MATTEI BLDG. FRESNO, CALIF. ATTORNEY-AT-LAW For defendant

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
Northern Division.

*__*__*__*__*__*__*__*__*

S. J. KORNBLUM and	:	No. 152 Civil
WILLIAM KORNBLUM,	*	
a corporation,	:	
Plaintiff,	*	ORDER ALLOWING
vs.	:	WRIT OF ERROR
KARL EMERZIAN,	*	
Defendant.	:	

*__*__*__*__*__*__*__*__*

Upon motion of Geo. Cosgrave and L. B. Hayhurst, attorneys for defendant and upon filing a petition for a writ of error and assignment of errors,

IT IS ORDERED that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein.

Dated: July 14, 1924.

Wm P James

Judge.

[Endorsed]: No. 152 - Civil IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs. KARL EMERZIAN, Defendant. ORDER ALLOW-

ING WRIT OF ERROR FILED JUL 14 1924 CHAS N. WILLIAMS, Clerk By R S. Zimmerman Deputy Clerk GEO. COSGRAVE MATTEI BLDG. FRESNO, CALIF. ATTORNEY-AT-LAW

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
Northern Division.

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*__*__*__*__*__*__*__*__*

S. J. KORNBLUM and : No. 152 Civil
WILLIAM KORNBLUM, *
a corporation, : SUPERSEDEAS
Plaintiff, * BOND ON WRIT OF
vs. : ERROR
KARL EMERZIAN, *
Defendant. :

*__*__*__*__*__*__*__*__*

WHEREAS, lately at a regular term of the District Court of the United States, Southern District of California, Northern Division thereof, a final judgment was on or about May 5th, 1924, rendered and entered in the above entitled cause against the above defendant, KARL EMERZIAN, for the sum of $18,460.00, together with legal interest thereon and costs of suit; and

WHEREAS, said KARL EMERZIAN intends to and is about to apply for the allowance of a writ of error returnable to the United States Circuit Court

of Appeals for the Ninth Circuit to reverse said judgment of said District Court of the United States in said cause and to file said writ of error, when obtained, in the Clerk's office of said court, and to apply for the issuance of a citation on said writ of error directed to said plaintiff in said cause citing it to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City and County of San Francisco, in the State of California, according to law, within thirty (30) days from the date of citation; and

WHEREAS, the said appellant is desirous of staying the execution of said judgment so appealed from;

NOW, THEREFORE, we the undersigned, KARL EMERZIAN, as principal, and RICHARD EMERZIAN and CHARLES EMERZIAN, as sureties, in consideration thereof, and of the premises, undertake and promise and do acknowledge ourselves, and each of us and our and each of our successors and assigns, held and firmly bound unto the plaintiff herein, its successors and assigns, jointly and severally, and undertake and promise in the sum of $25,000.00, Gold Coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay in United States Gold Coin to the said plaintiff, its successors or assigns, the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant herein upon such appeal; and if the appellant does not make such payment

within thirty (30) days after the said judgment becomes final, in the court from which the appeal is taken, judgment will be entered on motion of the respondent, in its favor, and against the undersigned sureties, for the said amount of said judgment, together with interest which may be due thereon and the damages and costs, which may be awarded to the appellant upon the appeal.

Karl Emerzian

Principal

Richard Emerzian

Charles Emerzian

Sureties

STATE OF CALIFORNIA)
(SS.
County of Fresno.)

RICHARD EMERZIAN and CHARLES EMERZIAN, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says: I am a resident and freeholder in said state and am worth the sum of Twenty-five Thousand Dollars over and above all my just debts and liabilities, exclusive of property exempt from exercution.

Charles Emerzian

Richard Emerzian

Subscribed and sworn to before me
this July 10, 1924.

James T. Barstow (Seal)

Notary public in and for said county and state

The above and foregoing bond upon writ of error is hereby approved and the same shall operate as a supersedeas.

Dated this 14 day of July, 1924.

Wm P James

United States District Judge

Kornblum v. Emerzian, No. 152-Civil

Hon. W. P. James,

United States District Judge:—

The supersedeas bond filed on behalf of Karl Emerzian in the above entitled action, with Richard Emerzian and Charles Emerzian, as sureties, is satisfactory to plaintiff.

Dated: July 9, 1924.

Lindsay & Conley
K. A. Miller and
Edward Schary

Attorneys for Plaintiff

[Endorsed]: No. 152-Civil IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA Northern Division. S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff, vs.

KARL EMERZIAN Defendant. SUPERSEDEAS BOND ON WRIT OF ERROR FILED JUL 14 1924 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk GEO. COSGRAVE Mattei Bldg. Fresno, Calif. ATTORNEY-AT-LAW For defendant

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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Northern Division

S. J. KORNBLUM and) No. 152 Civil
WILLIAM KORNBLUM,(
a corporation,)AMENDED PRAECIPE
Plaintiff, (FOR CERTIFIED
vs.) COPY OF TRAN-
KARL EMERZIAN, (SCRIPT OF RECORD
Defendant.) ON WRIT OF ERROR.
*__*__*__*__*__*__*__*__*

To the Clerk of said Court:

Sir: Please issue a certified Transcript of the Record on Writ of Error in the above-entitled case. to consist of the following papers, to-wit:

Citation on Writ of Error

Writ of Error

Amended Complaint

Answer to Amended Complaint, Counter-claim and Cross complaint

Answer to Counter-Claim and Cross Complaint

Findings of Fact and Conclusions of Law

Judgment
Bill of Exceptions
Opinion
Notice of Motion for New Trial
Order Denying Motion for New Trial
Assignment of Error
Petition for Writ of Error
Order Allowing Writ of Error
Supersedeas Bond on Writ of Error
Amended Praecipe.

Dated: October 20, 1924.

Geo. Cosgrave and L. B. Hayhurst

Attorneys for Defendant and
Plaintiff in Error

[Endorsed]: No. 152 Civil IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, Northern Division. S. J. KORNBLUM etc. Plaintiff, vs KARL EMERZIAN, Defendant. AMENDED PRAECIPE FOR CERTIFIED COPY OF TRANSCRIPT OF RECORD ON WRIT OF ERROR. FILED OCT. 21 1924 CHAS. N. WILLIAMS, Clerk By L. J. Cordes Deputy Clerk GEO. COSGRAVE Mattei Bldg Fresno, Calif. ATTORNEY-AT-LAW.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

*__*__*__*__*__*__*__*___*

S. J. KORNBLUM and)
WILLIAM KORNBLUM,)
a corporation,)
Plaintiff,)
vs.)
KARL EMERZIAN,)
Defendant.)

*__*__*__*__*__*__*__*___*

CLERK'S CERTIFICATE.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 147 pages, numbered from 1 to 147 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by the plaintiff-in-error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, amended complaint, answer to amended complaint, counter-claim, cross-complaint, answer to counter-claim and cross-complaint, findings of fact and conclusions of law, judgment, bill of exceptions, opinion, notice of motion for new trial, order denying motion, assignment of errors, petition for writ of error, order allowing writ of error, supersedeas bond and amended praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of October, in the year of our Lord One Thousand Nine Hundred and Twenty-four, and of our Independence the One Hundred and Forty-ninth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By
Deputy.

No. 4388

United States
Circuit Court of Appeals
For the Ninth Circuit

KARL EMERZIAN, Defendant in Error.

vs.

S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Plaintiff in Error,

Brief of Plaintiff in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

For Plaintiff in Error:
GEO. COSGRAVE, ESQ.,
L. B. HAYHURST, ESQ.,
Mattei Building, Fresno, Calif.

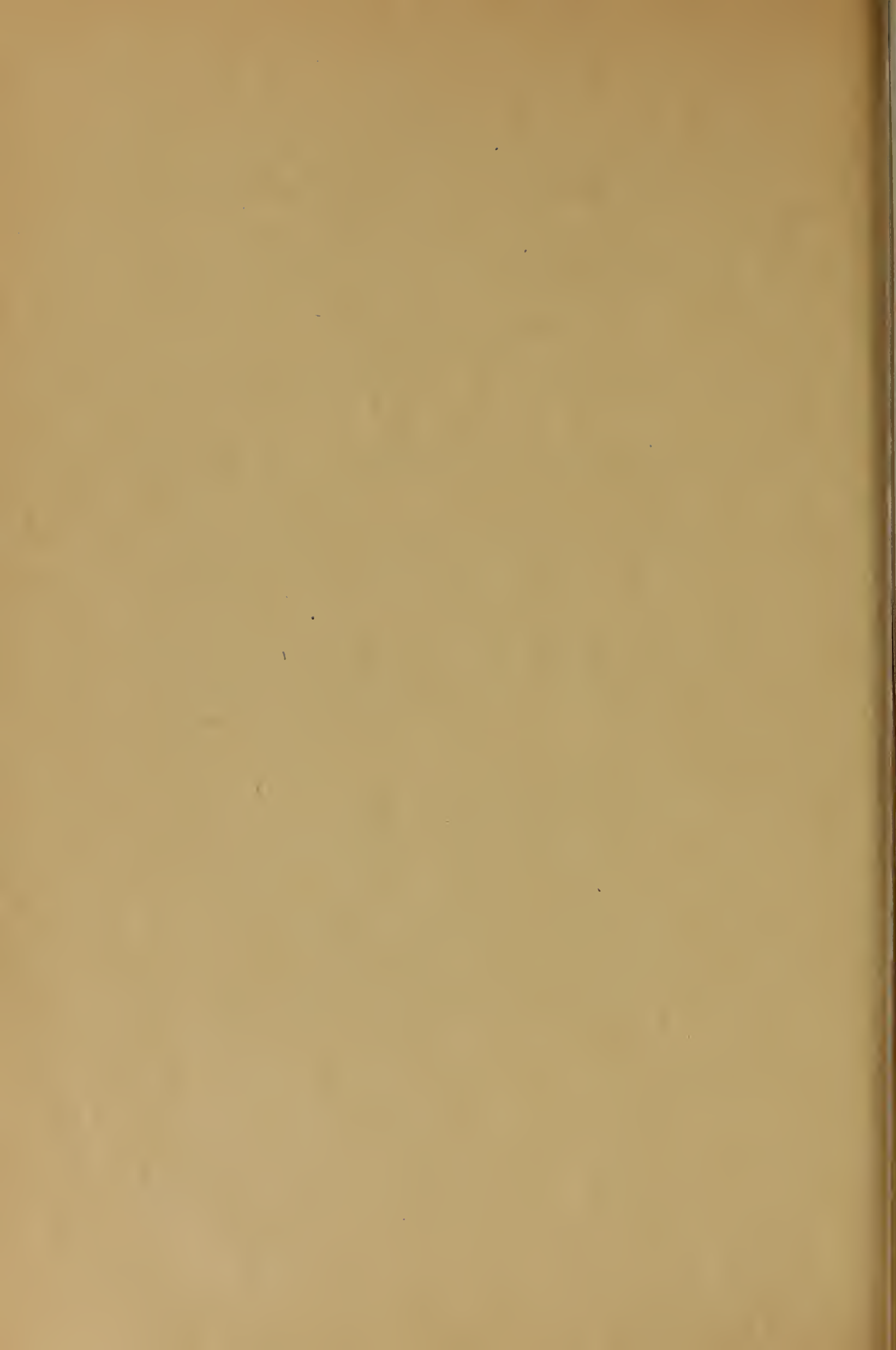
For Defendant in Error:
LINDSAY & CONLEY, ESQS.,
K. A. MILLER, ESQ.,
EDWARD SCHARY, ESQ.,
502 Mason Building, Fresno, Calif.

Filed this..........................day of January, 1925.

F. D. MONCKTON, Clerk.

By..Deputy.

FILED
JAN 15 1925



No. 4388

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KARL EMERZIAN,
Plaintiff in Error,

vs.

S. J. KORNBLUM and
WILLIAM KORNBLUM,
a corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR ON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Karl Emerzian, plaintiff in error, is a grower of grapes in the Fresno district. Defendant in error, S. J. and William Kornblum, is a New York corporation engaged in the shipment and sale of fresh grapes from California to the Eastern markets, and acted throughout the transactions involved in the suit, through Samuel J. Kornblum, its duly authorized agent.

In June, 1922, the parties entered into a contract by which Emerzian agreed to sell, and the corporation agreed to buy, 100 cars

of Muscat grapes. The contract is brief, reading:

> "For and in consideration of the sum of One Dollar in hand paid, the receipt of which is hereby acknowledged, the undersigned agree to the following:
>
> "Witnesseth:—
>
> "That Karl Emerzian, party of the first *party of the first* part agrees to sell, and S. J. and William Kornblum, parties of the second part, agree to buy One hundred cars of Muscat Grapes at Fifty dollars per ton, loaded, including lugs, in Refrigerator cars.
>
> "Same Fruit must be free of rain damage and suitable for Eastern shipment.
>
> "Shipment to begin when Fruit is well matured.
>
> "If buyer insists on covered lugs, he must pay the expense of same.
>
> "Fruit is to be paid for on loading of cars and surrender of Bill of Lading in Fresno.
>
> "On or about the fifteenth of August if Seller elects from Buyer to give seller an advance of Five or Ten Thousand Dollars, the Buyer agrees to do so.
>
> "In the event of Strikes or car shortage beyond the Sellers control, Seller is not responsible for delivery.
>
> S. J. & Wm. Kornblum
> By S. J. Kornblum."

Pursuant to the terms of the contract and after its execution, Emerzian asked and

received from the corporation, the sum of $10,000.00 as an advance. Shipment was begun under the contract on September 2nd and continued with fair regularity until the 26th of October, at which time a total of 48 cars had been received and paid for by the corporation, $100.00 being deducted, however, and charged against the original advance of $10,000.00. Forty-eight hundred dollars of this original advance had thus been accounted for, leaving in the hands of Emerzian, $5200.00.

A shortage of refrigerator cars developed in the Fresno district during that shipping season, becoming acute in October.

On the 18th of October an additional writing was made between the parties. The testimony as to the making of this additional contract is in violent dispute between the parties, Kornblum testifying that he was compelled to accept it by Emerzian, and the latter testifying that it was made at Kornblum's request. The corporation pleads (Transcript p. 19) that it "demanded and procured a writing from defendant that he would further deliver to plaintiff at least fifteen cars."

Two documents were written, one signed by Kornblum and another by both, and their

language is slightly different. Since they are short, they may be inserted herein.

> "I hereby agree to accept On the 100 cars Moscats to be loaded in refrigerator as per contrackt up to the present time he K. Emerzuan allready delivered 45 cars K. Emerzian to deliver no less than 15 cars more that will make 60 instead 100 cars if Minkler ranch however has more he agrees to deliver all
>
> S. J. Kornblum
> of Brooklyn N Y"

> "I hereby agree to acceppt On the 100 cars Muscat to be loaded in refrigerators as per contrackt up to present time he K. Emerzian allready delivered 45 car K. Emerzian agrees to deliver 15 more cars anyhow Or if there is more on Minkler Ranch Camp Six he must give me or deliver
>
> S. J. Kornblum
> K. Emerzian

The documents are both in the handwriting of Kornblum and it is without contradiction in the evidence that Emerzian wanted the provision "subject to car shortage" inserted. This Kornblum refused. The instruments are practically identical; one uses the expression "no less than 15 cars more" and the other "15 cars more anyhow."

Deliveries after the 18th of October were made practically as before, on the 19th, 22nd

and 26th, and were accepted and paid for.

The market price of Muscat grapes in the Fresno district had advanced from something below $50.00 a ton on September 1st, to about $85.00 a ton on October 23d, on which day the market broke. After that date, grapes were not salable.

Mr. Foley, a shipper of wide experience, called for defendant in error, said: "I was not able to get any buyers for any kind of grapes in Fresno after the 23d of October." (Transcript pp. 77.) And further, "On the 23d, you might have found a buyer on the 23d and 24th, but the Eastern markets broke badly on the 23d, and all indications were for a heavy decline, and nobody was looking to buy grapes among shippers. They were trying to unload what they had." (Transcript pp. 78.)

F. M. Withers, a witness called by defendant in error, said: "The market went off as a matter of common history on the 23d * * * it happened in twenty-four hours. The cause might have been the immense number of cars shipped from this neighborhood." (Transcript pp. 71.)

On October 27th, one-half inch of rain fell in the Fresno district. After this rain, the

corporation refused to take any grapes tendered by Emerzian, claiming that they were rain damaged and unfit for shipment to the Eastern market.

On November 3d, 1922, the corporation filed its action in the United States District Court for the Southern District of California, praying damages against Emerzian in the sum of $26,000.00 and return of the $5200.00 deposit. The complaint was amended in a respect not material to this hearing, and Emerzian, in due time, filed his answer to the amended complaint, denying his breach of the contract, and denying damage suffered by the corporation, and by way of counterclaim, seeking damages against the corporation for failure to receive and accept the 52 cars of grapes left upon his hands. He further alleged, by way of cross-complaint, that he had entered into a verbal contract to sell, and the corporation to buy, other grapes, and that by agreement, $3,000.00 of the advance was applied on the purchase price of these additional grapes, and alleging failure on the part of the corporation to receive and accept additional grapes, and praying damages against the corporation for its breach of this contract.

The action was tried before the Court,

Honorable W. P. James presiding, and judgment rendered in favor of the corporation, being defendant in error, adjudging it entitled to damages in the sum of $13,260.00, and for the return of the unpaid part of the advance, being $5200.00.

The Court passes upon the questions presented in its opinion found on Transcript pp. 109-116.

In his opinion (Transcript pp. 109 to 116) Judge James is in error as to the date of the delivery of the last car. This was on October 26th instead of October 22nd as stated on page 110 of the Opinion. (Exhibit H, Tr. p. 96.) He arrives at the market value by taking an average of six different periods, ignoring the period from October 23d to 27th when there was no market. In effect, he finds that the shipping season closed on October 27th when the rain came. He further finds that there was no consideration for the new agreement of October 18th, but that if this agreement were to be given effect, it would not change the original agreement because the agreement of October 18th included all grapes on the Minkler place, and according to the testimony, the product of this place was sufficient to make up the undelivered portion of the contract. The effect of the opinion is to fix the time of the breach of

the contract as of October 27th, the Court saying, (Transcript pp. 112) "All of the tenders of cars of grapes shown to have been made by the defendant occurred after this storm of the 27th, and it must be concluded that plaintiff was justified in refusing all offers of deliveries after that date."

ERRORS RELIED ON

For reversal, the plaintiff in error relies upon the following points:

1. Evidence was admitted and acted upon by the Court in its judgment showing the price of grapes described in the contract throughout the season, when under the law, evidence should have been admitted of the price only at the time of the breach of the contract. These errors are specified in the specification of errors, as numbered 1, 5, 16 and 17, and relate to, and comprise the objections made to the questions asked of witnesses Karl Emerzian, S. J. Kornblum, F. M. Withers and E. Y. Foley. It is necessary only to refer to specification No. 5 where the Court announced his ruling as follows: (Tr. p. 125)

"THE COURT: 'I will admit the testimony; and I am willing to hear you further, Mr. Cosgrave, on the argument, as to the application of it.

"I will admit the testimony showing the whole range of prices during the whole period, and leave it open to you gentlemen to argue further if you care to."

2. The Court committed error in admitting testimony of the various proposals and counter proposals made at the time of the execution of the modifying agreement on October 18th, 1922. The witness, S. J. Kornblum, was allowed to testify at length as to the conversations that could have had no other effect than to vary the terms of the written instrument set forth in specification No. 2, and to prejudice Emerzian before the Court.

3. The Court committed error in overruling the objection of defendant to the testimony of the witness S. J. Kornblum, that he went into the market and bought grapes to supply his demands, after the alleged failure of defendant Emerzian to deliver. This is shown in specifications 6, 7 and 9.

4. Error was committed in allowing the witness, S. J. Kornblum, to testify over the objection of defendant, that on the strength of the contract with Emerzian, he entered into a contract with people in the East to

deliver them Muscat grapes. This is covered in specification No. 8. The rule of damages is laid down by the Civil Code, and this evidence was entirely outside the issues and not a proper element of damages.

5. The Court committed error in sustaining the plaintiff's objection to the question asked witness S. J. Kornblum, on cross-examination, as to whom other than Charles Emerzian, he told that the contract of November 18th had been extorted from him, set forth in specification 13.

6. A further error was committed by the Court in refusing to allow defendant to amend his pleading or to offer to amend the same by pleading the shortage of cars as a separate defense, the same being made necessary by the position taken by the plaintiff in objecting to the introduction of the modifying agreement of October 18th.

7. Further error was committed by the Court in its computation of damages in that the period when no price was obtainable for grapes is not included in his average of price.

8. A sufficient car supply was a condition precedent to liability on the part of defendant.

ARGUMENT

An examination of the record in this case will show the following propositions established without dispute:

1. No time is limited in the contract in which delivery of the grapes was to be completed.

2. According to the pleading of defendant in error, it "then and there demanded and procured a writing," being the agreement of October 18th, from plaintiff in error. It is in Kornblum's own handwriting. Emerzian asked that the provision, "subject to car shortage" be put in, which Kornblum refused.

3. The market for Muscat grapes broke on October 23d, and after that date, they could not be given away.

4. Deliveries were continued and accepted by Kornblum to and including October 26th.

5. There was no rain before October 27th.

Referring now to our first specification of error, the rights of the parties to the action manifestly are governed by the California Civil Code, Section 3308.

"The detriment caused by the breach of seller's agreement to deliver personal property * * * is deemed to be the excess, if any, of the value of the property to the buyer over the amount which would have been due to seller under the contract, if it had been fulfilled."

C. C. 3308.

"The value of property to a buyer" is defined in another section.

> "In estimating damages * * * the value of property to a buyer or owner thereof deprived of its possession is deemed to be the price at which he might have bought an equivalent thing in a market nearest the place where the property ought to have been put into his possession, and at such time after the breach of duty, upon which his right to damages is founded, as would suffice with reasonable diligence for him to make such a purchase."
>
> C. C. 3354.

It will not be disputed, of course, that under the Civil Code of California above cited, plaintiff is confined in his claim for damages to the difference between the contract price and the market price at the time when the contract was breached. This must be at the latest time when defendant might have fulfilled his contract.

The learned Judge of the District Court recognizes this for he says in his opinion, (Transcript pp. 112) "All of the tenders of cars of grapes shown to have been made by defendant occurred after this storm of the 27th, and it must be concluded that plaintiff was justified in refusing all offered deliveries of grapes after that date."

When did the "breach of duty" upon which, perforce, the right to damages in this case depends, occur? Can it be argued that it occurred at a time when the buyer, Kornblum Corporation, was receiving and accepting cars under the contract? It must be borne in mind that when negotiations that resulted in the modified contract were pending, according to his own testimony, Kornblum told Emerzian, " 'Well,' I says, 'what is the use of arguing about it now? Why don't you go on and give me all you can. Give me a *couple of cars a week and you will be giving me the grapes* and we won't have any fight about it.' " (Transcript pp. 45.) Emerzian did deliver two cars a week after that time.

It will not be denied that if Karl Emerzian on October 23d, 1922, had delivered to the Kornblum Corporation 52 cars of grapes, he would have complied with the terms of his contract. Neither can it be denied that had

he delivered the same on the 24th, 25th, 26th or 27th, he would have been entirely within his rights. He was under no sort of compulsion and no agreement to deliver all the grapes on the 23d or the 24th or the 25th. He was delivering two cars a week, let the Court bear in mind, as requested by Kornblum.

If his rights were still preserved, and if he were within his rights in delivering on the 26th, how, then could it be argued there was any breach in his contract before that date? It is entirely too plain to need any argument that the breach if any occurred when Emerzian first offered grapes that Kornblum refused.

The learned Judge of the District Court, in estimating the damages to be allowed in this case cites 24 Ruling Case Law, Page 72: "Where the goods are to be delivered in installments and there is a failure to deliver two or more, or all of the installments, the proper measure of damages is the sum of the differences between the contract and the market prices of the quantity of each installment not delivered at the respective times of delivery."

R. C. L. pp. 72.

We have no quarrel whatever with the statement of the rule. It does not apply, how-

ever, to the contract before the Court for the reason that that contract did not provide that delivery was to be made in installments. It merely specifies a time when delivery is to commence, but is silent beyond that. Had the parties in mind any condition of this kind, it would have been a very easy thing for them to have inserted it in their contract, such as, "So many cars per week," or "so many cars per month." The fact that they specified the time of commencement of delivery and did not specify the rate of delivery is itself significant that the clause was purposely omitted, but whether omitted purposely or not, it certainly is not the province of the Court to supply it. This contract would have been complied with by Emerzian by delivering the grapes at any time during the shipping season, and he was not in default until this period came to an end.

The only light we have on what constitutes the shipping season is furnished by two witnesses, one E. Y. Foley, one of the largest shippers in the State, called by defendant in error, who says: (Transcript pp. 78) "The last season (1923) we didn't quit shipping until the 23d of December, which was due entirely to the demand and the purpose they wanted the grapes for."

Another witness, Hensley, called by plaintiff in error, said, speaking of the season 1922: (Transcript pp. 105) "We shipped fruit during November up to and until the 30th of November, when we shipped our last car."

Emerzian could have complied with his contract by shipping at any time in November, or even in December.

Referring to the rule laid down in Ruling Case Law and cited by the trial Court, an examination of the citations supporting the language of the text shows clearly the correctness of our contention. Every one of the five cases cited involved contracts calling for definite quantities at definite times, and even then the cases uniformly hold that there is no breach until the expiration of the time provided for delivery of each installment.

The rule cited cannot govern the case at bar for the obvious reason that the contract here involved, does not provide for delivery by installments.

A case quite similar to the case at bar is that of Curtiss vs. Howell, decided by the Supreme Court of New York. Defendant agreed to deliver 1000 tons of tan bark per

year to plaintiff to commence September 1, 1854. By June, 1855, the defendant had delivered only 30 or 40 tons thereof. Plaintiff had repeatedly urged delivery. In June, 1855, plaintiff brought suit, alleging a breach of agreement by defendant. The Court held that defendant had the entire year within which to deliver the 1000 tons. The situation was no different than if defendant had agreed to pay $1000.00 per year, then certainly defendant would have had the whole year within which to pay. In its opinion the Court said, "The Judge upon the trial held, that by the true construction of the contract, the defendant had the entire year to deliver the thousand tons of bark required to be delivered per year during five years. In this, I think he was correct."

Curtiss vs. Howell, 39 N. Y. 211.

Another case practically on all fours with the case at bar, and illustrating precisely the points for which we contend, is Harman vs. Washington Fuel Company, decided by the Supreme Court of Illinois. The action involved a contract where the defendant had agreed to furnish five to eight thousand tons of coal from the date of the contract to April 1, 1903, at $1.40 f. o. b. cars at the mine. The Court says,

> "The defendant had all of the time up to April 1, 1903, in which to furnish plaintiffs with the coal under the contract * * * the parties evidently contemplated delivery from time to time, since the contract provided settlements should be made on or before the first of each month for the previous month's shipment, and shipments were actually begun in August, 1902, and continued until the market price of coal rose above the contract price, and yet the agreement would have been comlpied with by delivery of coal at any time up to April 1, 1903. (Phelps v. McGee, 18 Ill. 155.) There was no evidence of the market price of coal at the mine on that date, and only nominal damages could be given for the breach of that contract."
>
> Harman v. Washington Fuel Co. 81 NE 1017 (1018).

Certainly the provision in the contract in that case that settlement should be made for each month's shipment is more conclusive of installments than anything in the case at bar.

Defendant in error must therefore be confined in his allowance of damages to the market price at the close of the season which certainly did not occur before October 27th. He shipped a car on the 26th.

THE COMPUTATION OF DAMAGES IS INCORRECT

It will be noted that Judge James, in computing the damages, tabulates the market price of grapes at six different periods, beginning with $38.70 per ton, and ending with $86.25; in order to reach his estimate of $67.00 per ton, he divides the total of the six sums added, by six. (Transcript pp. 110) He entirely overlooks the period from the 23d to 27th, when there was no market at all for grapes, and which should have been included, making seven periods, with the result the average price, instead of being $67.00 per ton would have been $57.50. The four days from the 23d to the 27th certainly formed a distinct period contemplated in the contract, and should have been taken into account, even on the theory adopted by the trial court.

MODIFYING AGREEMENT

A great deal of space is taken up in the record with the modifying agreement made by the parties on October 18th, and hereinbefore in this brief set out. Judge James holds that the agreement was without consideration (Transcript 114) but that in any

event, it did not change the obligation of the plaintiff in error under the original contract.

With this conclusion we respectfully differ. Notwithstanding the mass of contradiction attending the execution of this contract, the fact remains that it was executed and delivered, and in the handwriting of Kornblum himself.

The parties agreed to the things therein contained. Emerzian agreed to deliver 15 cars "anyhow"; in the other supposed duplicate, they use the language "no less than 15 cars more, that will make 60 cars instead of 100."

Now, it must be remembered that the evidence in the record is uncontradicted, that Emerzian asked that the clause, "subject to car shortage", be inserted in this modifying contract. This Kornblum refused. Emerzian, therefore, waived a substantial and valuable right that he possessed under the first contract, that is, to escape liability in the event of car shortage. The language of the modifying contract, coupled with the evidence attending its execution, leaves no possible doubt upon this point. The modifying contract is therefore supported by a sufficient consideration.

Whether or not it relieves Emerzian of any burden assumed in the original as suggested by Judge James, we need not discuss. One thing, however, cannot be denied. The effect of the modifying contract was to leave the parties as though they had, on October 18, 1922, for the first time, entered into a contract. In other words, assuming the worst for Emerzian, he agreed, on October 18th, to deliver all of the grapes on the Minkler ranch. The contract is, of course, silent as to the time of delivery.

In order to sustain the judgment of the trial court it must appear that this obligation to deliver must have been performed before the 23d, which manifestly is not the case. He might, in an extreme view, be held for damages for that part of the 52 cars deliverable between the 18th and the 23d, but not for any deliverable beyond the 23d. Viewed in any possible light, it was perfectly competent for the parties to make this modifying agreement of October 18th.

While there might not have been any consideration on the part of Kornblum, there assuredly was on the part of Emerzian. From the mass of contradictory testimony regarding the execution of this contract, the truth in our judgment is not hard to obtain. On

account of the shortage of cars, Kornblum was uncertain whether he could obtain complete delivery, and rather than take a chance of receiving an uncertain 52 cars, he accepted a certain 15.

RULINGS

Prejudicial error was committed in the ruling of the trial court by which Kornblum was allowed to testify over objection of plaintiff in error that on the strength of his contract with Emerzian, he made contracts of sale of grapes in the East. (Tr. pp. 128) No special damage on this account was pleaded, and the evidence was prejudicial to the plaintiff in error.

Cole v. Swanston, 1 Cal. 51.

Error was also committed when witness Kornblum was allowed to testify over objection that he had gone into the market and purchased grapes from persons other than the plaintiff in error. (Tr. pp. 129) This is prejudicial error.

Fairchild v. Southern etc. Co., 158 Cal. 264 (271).

Plaintiff in error therefore respectfully submits that the damages assessed by the trial court are entirely excessive, not supported by

the law of California and computed upon an entirely erroneous theory; that the rulings of the trial court also are such as to call for reversal.

Respectfully submitted,
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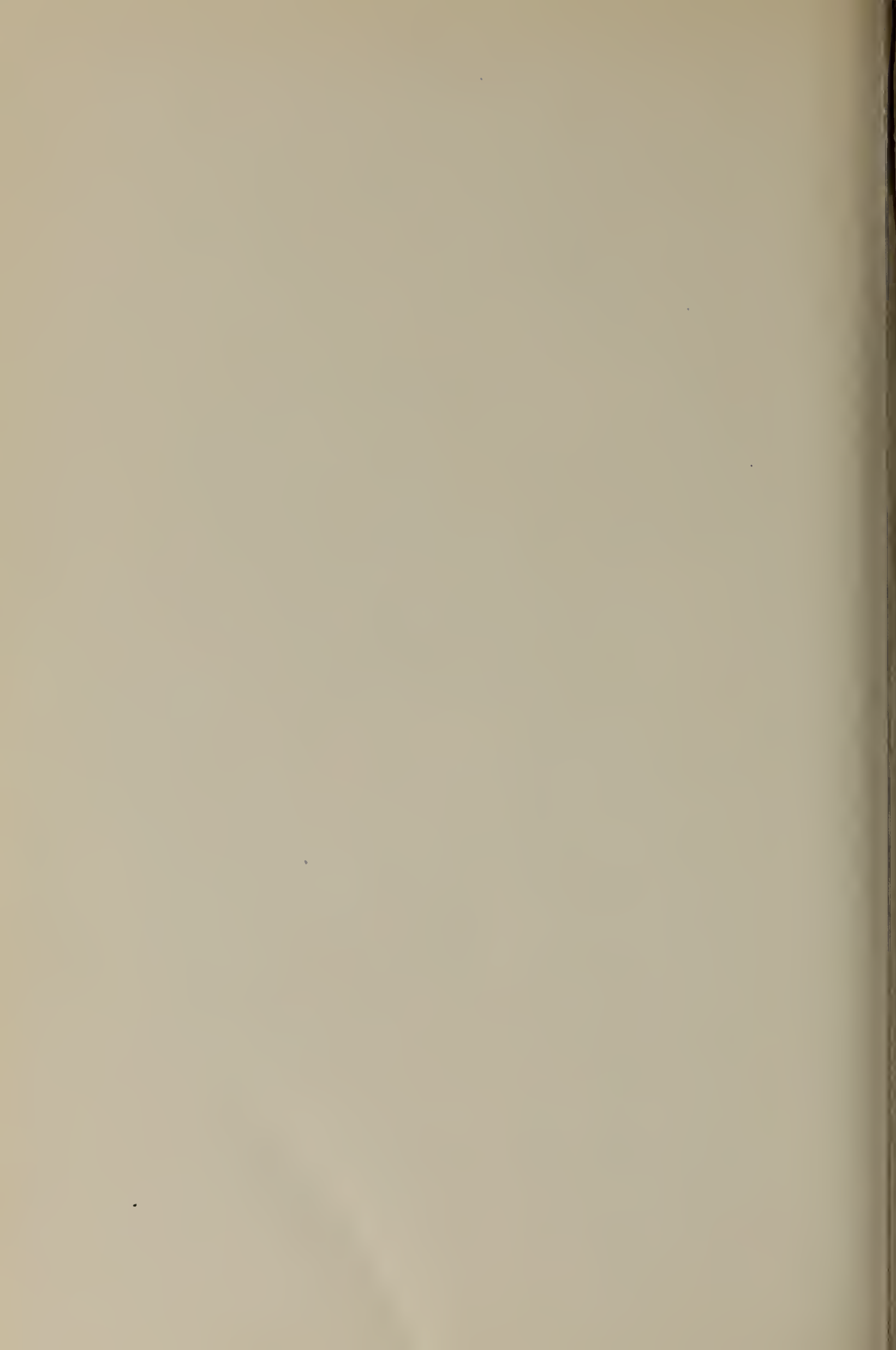
Attorneys for Plaintiff.



No. 4388.

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Karl Emerzian,

Plaintiff in Error,

vs.

S. J. Kornblum and William Kornblum, a Corporation,

Defendant in Error,

BRIEF OF DEFENDANT IN ERROR.

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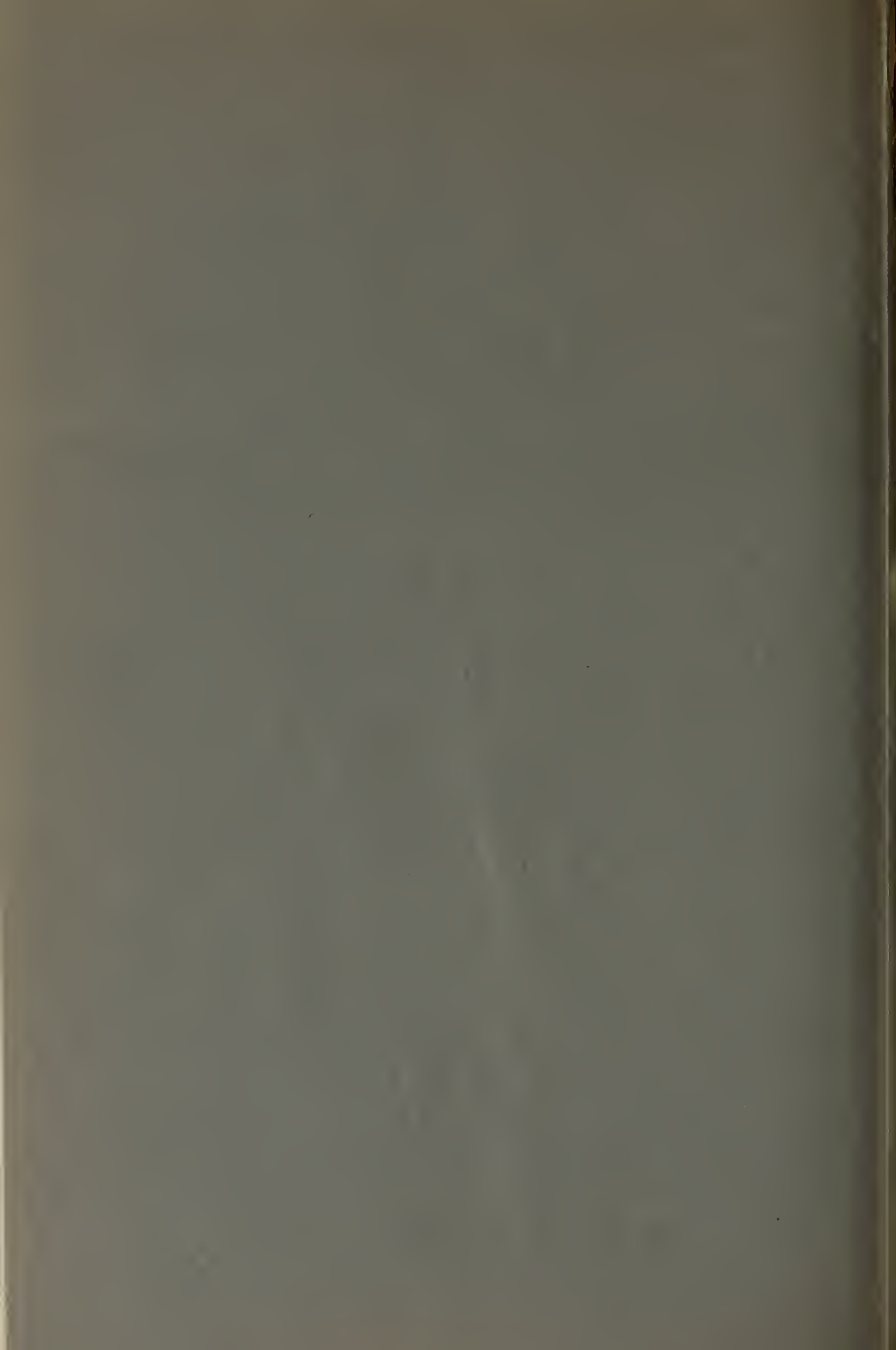

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Karl Emerzian,

Plaintiff in Error,

vs.

S. J. Kornblum and William Kornblum, a Corporation,

Defendant in Error.

Brief of Defendant in Error on Writ of Error from the United States District Court for the Southern District of California.

This is an appeal by Karl Emerzian, plaintiff in error and defendant, from a judgment awarded S. J. Kornblum and William Kornblum, a corporation. The action was based upon a contract in writing entered into between the corporation and Emerzian, by which Emerzian agreed to sell and the corporation agreed to buy one hundred cars of Muscat grapes, during the grape season of 1922.

The amended complaint sets forth the contract in writing, which forms the basis of the suit, as follows:

"For and in consideration of the sum of One Dollar in hand paid, the receipt of which is hereby acknowledged, the undersigned agree to the following:

Witnesseth:—

That Karl Emerzian, party of the first part, agrees to sell, and S. J. and William Kornblum, parties of the second part, agree to buy One Hundred cars of Muscat grapes at Fifty dollars per ton, loaded, including lugs, in Refrigerator cars.

Same fruit must be free of rain damage and suitable for Eastern shipment.

Shipment to begin when fruit is well matured.

If Buyer insists on covered lugs, he must pay the expense of same.

Fruit is to be paid for on loading of cars and surrender of Bill of Lading in Fresno.

On or about the fifteenth of August if Seller elects from Buyer to give seller an advance of Five or Ten Thousand Dollars, the Buyer agrees to do so.

In the event of strikes or car shortage beyond the Seller's control, Seller is not responsible for delivery.

S. J. & Wm. Kornblum
By S. J. Kornblum."

[Tr. pp. 9-10.]

The sum of ten thousand dollars was advanced by Kornblum to Emerzian under the contract. The amended complaint further alleges that forty-eight cars of Muscat grapes were delivered by Emerzian and were paid for in full by the corporation in accordance with the contract, and that fifty-two cars of said Muscat grapes were not delivered. [Tr. pp. 6-10.]

The answer denies that there was any failure, refusal or neglect on the part of Emerzian to comply with the contract, but avers that the corporation refused to accept the balance of the fifty-two cars. By a counterclaim plaintiff in error alleges a written modification of the contract,

"whereby plaintiff agreed to accept in full performance of the terms of said contract, on the part of the defendant, the entire product of the Minkler Ranch, the same to be not less than fifteen cars of grapes.

"That the Minkler Ranch described in said modification of said contract was owned by defendant and bore at said time the crop of Muscat grapes which were the grapes described in said original contract." [Tr. p. 13.]

A tender of said fifteen cars of grapes is thereafter alleged and a refusal to accept the same; the counterclaim proceeds as follows:

"That at the time of the refusal of plaintiff so to receive and accept said bills of lading, and at the time that plaintiff so notified defendant that it would not receive any more of said grapes, approximately three hundred tons of grapes were on the said Minkler Ranch,"

and damages are asked by reason of the alleged refusal to accept the grapes.

A cross-complaint alleges a contract for the sale of certain other varieties of grapes with the refusal of plaintiff to accept the same in accordance with the contract and a consequent damage. [Tr. pp. 11 to 17.]

The answer to the counterclaim and cross-complaint denies any modification of the original contract in writing, but alleges that the later writing which was executed relative to the fifteen cars was merely intended as a further assurance of good faith on the part of both parties for the fulfillment of the contract originally entered into. It is denied that defendant tendered any grapes in accordance with the terms of the contract which were refused. The answer to the cross-complaint further denies any contract for the purchase of other varieties of grapes and denies damage. [Tr. pp. 18-24.]

The findings of fact and conclusions of law, prepared in accordance with the opinion of the court, find that the original contract (Plaintiff's Exhibit "A") was executed by the respective parties; that said contract referred exclusively to the 1922 crop; that the sum of ten thousand dollars was deposited with defendant by the corporation and that the sum of four thousand eight hundred dollars ($4800.00) was applied to the purchase of cars actually delivered to plaintiff by defendant, leaving a balance of the deposit in the hands of Emerzian of five thousand two hundred dollars ($5200.00); that forty-eight cars out of the one hundred cars of Muscat grapes were delivered to plaintiff and were accepted and paid for by it; that said cars of grapes averaged fifteen tons or thirty thousand pounds each; that defendant failed, neglected and refused to deliver the remaining fifty-two cars of Muscat grapes to the damage of the plaintiff in the sum of thirteen thousand two hundred sixty dollars ($13,260.00) in addition to the five thousand two hun-

dred dollar ($5200.00) balance of deposit. The findings are further to the effect that no cars of grapes were tendered in accordance with the contract which were not accepted; that plaintiff fully kept and performed all of the terms, covenants and conditions of the agreement on its part to be kept and performed; that seven cars of Muscat grapes were tendered by defendant to plaintiff in October and November, 1922, but that they did not comply with the contract and were decayed and unsuitable and unfit for Eastern shipment; and that at the time of said tender and at all times thereafter defendant was unable to tender or deliver to plaintiff any Muscat grapes in carload lots that were free from rain damage and fit and suitable for Eastern shipment.

The court further finds that the writing executed subsequent to the original contract was not a modification of the original contract. Judgment was therefore ordered and entered in the sum of eighteen thousand four hundred sixty dollars ($18,460.00), together with interest. [Tr. pp. 25-30.]

The Evidence.

We shall review briefly the evidence in the case.

The first witness was Karl Emerzian, defendant and plaintiff in error, who was called for cross-examination under the provisions of section 2055 of the Code of Civil Procedure. He testified that he delivered forty-eight cars out of the one hundred; that the first time Kornblum refused to accept any grapes was October 26th [Tr. p. 35.]; that tenders were made by

him after that date and that he considered such grapes to comply with the contract; that on the 26th of October Kornblum accepted a car. The witness testified further that Kornblum requested the written modification of the contract from him in the Sequoia Hotel in Fresno. [Tr. pp. 38-39.]

S. J. Kornblum testified that he was representing the plaintiff corporation in Fresno, and that he is thoroughly familiar with the grape business; that during the 1922 grape shipping season he constantly demanded of Emerzian that he comply with his contract.

"I demanded grapes every night he came to the lobby of the Sequoia Hotel. I asked him the reason why he didn't give me any grapes that I bought. He said, 'I can't obtain no cars.' I says, 'Why you can get cars to load other stuff.' 'Well,' he says, 'I can get $35.00 or $40.00 a ton more and I can give you your grapes anytime. We have no contract as to dates when I have to give you the grapes.'" [Tr. p. 41.]

After constant refusal on the part of Emerzian to fulfill his contract Emerzian finally told Kornblum on the 18th of October that he wanted to deliver only fifteen carloads more of grapes. The conversation is described between pages 43 and 46 of the transcript. Tenders of grapes made after the 28th of October were not in compliance with the contract because of the rain damage to the grapes; they were not suitable for Eastern shipment. [Tr. pp. 47-49.] The witness testified as to the price of grapes during the season as follows:

September 1st	$40.00
September 10th,	47.50
September 20th	65.00
October 1st,	70.00
October 15th	82.50
October 10th,	72.50 to $75.00
October 18th,	90.00

[Tr. p. 50.]

Kornblum testified that he was forced to purchase other Muscat grapes during the season from $85.00 to $87.50 per ton in order to fulfill outstanding contracts. [Tr. p. 51.] About twenty to twenty-two cars were thus bought. [Tr. p. 55.] The alleged modifying agreements were introduced in evidence and are shown on pages 61 and 62 of the transcript to be as follows:

"S. J. Kornblum
of Brooklyn, N. Y.

(S)
Sequoia Hotel,
E. C. White, Mgr.
Fresno, California.

October 18th, 1922.

I hereby agree to accept on the 100 cars Muscats to be loaded in refergerator as per contrackt up to the present time he K. Emerzian allready delivered 45 cars K. Emerzian to deliver no less than 15 cars more than will make 60 cars instead of 100 cars if Minkler ranch however has more he agrees to deliver all.

S. J. Kornblum
of Brooklyn, N. Y."

(Testimony of S. J. Kornblum):

"(S) Sequoia Hotel,
E. C. White, Mgr.
200 rooms 10/18
I hereby agree to accept on the 100 cars Muscat to be loaded in refrigerators as per contrackt up to present time he K. Emerzian allready delivered 45 car K. Emerzian agrees to deliver 15 more cars anyhow Or if there is more on Minkler Ranch, Camp Six, he must give to me or deliver.

S. J. Kornblum
K. Emerzian."

The market on Muscat grapes began to break on the 23rd of October. [Tr. p. 63.] One car of grapes was accepted by him on the 26th of October. "On the 26th the market price was $40.00, maybe $50.00.)" [Tr. p. 65.]

Walter Bonnett of the United States Weather Bureau testified that a heavy rain fell in this territory on the 27th of October, there being 51/100 of an inch precipitation. [Tr. pp. 67-69.]

F. M. Withers, in the fruit and produce business, who handled between 175 and 225 cars of grapes in 1922, testified that Muscats were generally damaged by the rain of October 27th, and that in his opinion no Muscat grapes were suitable for Eastern shipment after the rain. The witness testified that the prices of Muscat grapes were as follows:

"From September 1st to October 1st the price of grapes climbed from $37.50 to $65.00 a ton; from October 1st until October 18th the price kept climbing until it was $85.00 a ton at the latter date. The market dropped on the 23rd of October." [Tr. pp. 69-71.]

M. M. Bakalian was engaged in grape shipping in 1922. He examined certain grapes of Emerzian after the rains and found them unfit for shipment. · [Tr. pp. 71 to 72.]

H. Sakajian, who qualified as a grape expert, also testified as to the poor condition of Emerzian's grapes after the rain. [Tr. pp. 72 to 75.]

E. Y. Foley, an experienced grape shipper, testified that the market prices of Muscats during 1922 were as follows:

August 25th,	$52.50
August 27th,	60.00
August 29th,	62.50
September 1st to 25th	62.50
September 25th to October 3rd,	72.50 to $80.00
October 3rd to 6th,	85.00

On the 13th of October the witness sold a car of Muscats at $100.00 per ton. On October 2nd Mr. Kornblum bought from the witness five cars of grapes at $82.50 a ton. Muscat grapes are very susceptible to rain damage and after October 27th, 1922, the witness had doubts as to whether any of the Muscats would carry in good condition to Eastern markets, "for they were soft occasioned by the rain." "I didn't see any grapes after October 27th that were free from rain damage." [Tr. pp. 75 to 78.]

Karl Emerzian was called for further cross-examination and thereupon the plaintiff's case was closed. [Tr. pp. 78-79.]

Samuel J. Kornblum was then called by the defendant under section 2055 and repeated his statements that Emerzian had frequently told him that he would not deliver to him early in the season because the contract did not call for any specific dates for delivery. [Tr. pp. 84 to 87.]

Karl Emerzian was thereupon called as a witness on his behalf. He testified relative to the written modification of the agreement, as to his alleged tender of grapes, and as to the matters covered by his cross-complaint. The witness further testified:

"Notwithstanding, Kornblum had seventy cars of Muscats coming under his contract, on October 5th he entered into a contract with me to take additional cars of Muscats at $80.00 a ton. He told me if I can get more he will buy them. I was going to give him all I had and did give him all I could get cars for. He asked me if I could get more Muscats at $80.00 than the contract, he will buy them. At that time my brother's grapes were on the trays, all of them. At that time Mr. Kornblum breached his contract, I had 500 tons of Muscat grapes that I could deliver him. I kept them for my contract." [Tr. p. 92.]

"When I first entered into the contract I took him all around to these different vineyards and finally went out to the Minkler Ranch and to Camp Five and said, 'Now Emerzian Brothers own this other place but this is mine and I am going to give you the grapes right from here', and we agreed upon it then, that all the grapes he was going to get were to come from Camp Five and from the Tagus ranch 100 tons, that means about 6 or 7 or 8 cars. I completed my contract with him as far as the Tagus ranch was concerned. It was

the distinct understanding with him that the balance of the grapes were to come from Camp Five, Minkler ranch." [Tr. p. 94.]

When discussing the alleged modification of the contract Emerzian claims that time and time again he stated to Kornblum that he would give Kornblum fifteen cars "and all I got on the Minkler ranch."

PETER MALJAN was the broker in the transaction and testified that the cars tendered by Emerzian and refused by Kornblum after the rains were sold at a loss. The schedule of car shipments was introduced in connection with this testimony, [Tr. pp. 95 to 99, lines 18 and 19, p. 8.]

V. TARJANIAN testified to the effect that the rains of the 27th of October did not very badly injure the Muscats. [Tr. pp. 101-102.]

C. TARZARIAN testified that the Muscats were not injured by the rain. [Tr. pp. 102-103.]

J. H. BARKER [Tr. pp. 103-105] and GEO. HENSLEY Tr. pp. 105-106], testified that there were still Muscat grapes available for manufacturing purposes after the rains of October. The testimony closed after short re-examinations of Emerzian and Kornblum.

From this brief review of the testimony it will be seen that upon several important points there was a sharp conflict in the evidence; the trial court adopted the view of the principal facts taken by plaintiff.

I. Several Arguments of Plaintiff in Error Are Without Substantial Merit.

The chief alleged errors relied on by plaintiff in error are those centering about the computation of damages. It is contended that erroneously "evidence was admitted and acted upon by the court in its judgment showing the price of grapes described in the contract throughout the season." It is further assigned as error that the court in its computation of damages did not include a period in which "no price was obtainable for grapes." The point is also made that the court was wrong in its finding that the second instrument signed by the parties did not, as a matter of law, modify the original agreement. These are the principal arguments advanced by plaintiff in error; but there are a number of minor points which we desire to dispose of before considering the principal arguments.

Objection is made to the fact that the court, acting within its discretion, refused to permit the amendment of defendant's pleadings in the midst of the trial, so as to set forth an alleged car shortage as an excuse for non-performance. Defendant pleaded in his answer that at all times he stood ready, able and willing to perform and make delivery. This amendment, during the trial, would have constituted a complete departure from the theory which had formed the basis of the defense; the answer and counterclaim had alleged a tender upon the part of the defendant, and there had been no claim whatsoever that defendant's failure to deliver the remaining cars was due to a car shortage.

Hence plaintiff went to trial solely upon the affirmative issue of performance and no notice of any issue of car shortage, and as a result, therefore, no preparation was made for such issue. This matter was, of course, wholly within the sound discretion of the court, and we submit that there was no abuse of discretion under the circumstances shown by the ruling.

Manha v. Union Fertilizer Co., 151 Cal. 581;
Salmon v. Rathjens, 152 Cal. 290;
Allen v. Los Molinos Land Co., 25 Cal. App. 206, 213.

This also disposes of number 8 under "errors relied on" in the brief of the plaintiff in error, which is as follows:

"A sufficient car supply was a condition precedent to a liability on the part of defendant."

If defendant relied upon a shortage of cars as an excuse for non-performance he should have pleaded the alleged facts as a positive defense. The pleadings were conclusive to the effect that there was no car shortage, and defendant relied solely upon a tender as a defense. Since there was no pleading of a car shortage, plaintiff in error is foreclosed upon this asserted error and especially can not rely upon this point on appeal.

Eucalyptus Growers' Association v. Orange etc. Company, 174 Cal. 330;
Peek v. Steinberg, 163 Cal. 127;
Bartlett Springs Company v. Standard Box Co., 16 Cal. App. 671, 675;
Civil Code, Sections 1511, 1512, 1514;
6 Cal. Juris., 449.

It is also claimed that the court erred in permitting S. J. Kornblum to testify as to conversations which he and Emerzian had at the time of the signing of the alleged modification of the original contract. As the court stated at the time the objection was made:

"Anything that occurred between the parties by way of a dispute or a claim for failure and a denial of delivery and all of those things must be ventilated here in order to get at the facts of this controversy. Grapes are admitted not to have been delivered in full performance of the contract and the question is why, and I suppose the only way to get at it is to find out what happened between them during that time." [Tr. p. 42.]

There was a direct issue formed by the pleadings as to whether the writings signed subsequently to the execution of the original contract were indeed a modification of the original agreement, or whether they were merely further assurances of performance on the part of the defendant. In order to determine this issue, the court necessarily had to acquaint itself concerning the facts and circumstances surrounding the signing of these latter instruments.

Code Civil Procedure, Section 1860;
Civil Code, Section 1647;
6 Cal. Juris, 294.

Objection is made to the admission of certain testimony on the part of Mr. Kornblum that he went into the open market and bought grapes to supply his own contracts, after the failure of defendant Emerzian to deliver to him. In support of his position, plaintiff in

error cites *Fairchild v. Southern etc. Co.,* 158 Cal. 264, 271. That case merely holds that the specific prices paid for articles necessary to replace other articles which a contracting party had failed to deliver, was not the proper measure of damages. In this case, the evidence was not admitted to prove damages, but only to show the facts surrounding the execution of the later instruments, and to cast light on Emerzian's testimony that Kornblum had importuned him to sign the second instrument which cut down the number of cars deliverable under the contract.

Plaintiff in error also complains of the admission of evidence to the effect that Kornblum had outstanding contracts for the resale of grapes in the East, and cites *Cole v. Swanston,* 1 Cal. 51. That case establishes the rule that there can be no recovery of prospective resale profits without special pleading to that effect. In the present case, the damages are not based upon the loss of prospective resale profits. The court specifically stated that this testimony was not admitted for the purpose of establishing damages, but restricted same solely to the circumstances surrounding the claimed modification. [Tr. p. 54.]

It is also objected that the court did not permit an answer to a question in the cross-examination of Mr. Kornblum, which was as follows:

"Q. To whom else other than to Charles Emerzian, the nephew, did you tell that this contract had been extorted from you?"

We submit that an answer to this question would have been wholly incompetent, irrelevant and imma-

terial, and that the court was correct in sustaining the objection. Its lack of mutuality is especially emphasized in view of the fact that the claimed modification of the agreement had no consideration therefor, and was wholly unperformed, and hence had no bearing under the evidence upon the real issue.

Thus, the only substantial points made by plaintiff in error on this appeal are the following:

1. Was the court in error in fixing the damages?

2. Was the court in error in holding that the alleged "modifying agreement" did not in fact modify the original contract?

We shall discuss these questions in the order mentioned.

II. The Court Properly Determined the Amount of Damages.

The learned District Judge stated in his opinion:

"The rule of damages is, I think, clearly stated by plaintiff's counsel to be that expressed in sections 3308 and 3309 of the Civil Code of California (see also Vol. 24, Ruling Case Law, page 72, on general subject); that is, damages would be the excess of the value of the grapes to the buyer over the amount which would have been due to the seller under the contract if it had been fulfilled." [Tr. p. 115.]

It thus becomes a matter of great moment to determine the exact meaning of the original contract of sale, so that it can be determined when the breach took place. The trial court, as is shown by the opinion, took the view that at the time of the execution of

the contract, the parties contemplated that the grape season would end as soon as heavy rains fell; that in order to deliver the one hundred cars of Muscat grapes, it was seller's duty to so distribute his delivery of cars over the entire grape season as to complete his contract within the period limited by natural conditions. In this connection, it should be noted that under the terms of the contract, shipments were to begin "when fruit is well matured."

To contend, as plaintiff in error does in his brief, that he could wait until the grape season was terminated by natural conditions, and that the breach did not occur until a day or two before the end of the season when the price of grapes had fallen, and that there was no breach during the time earlier in the season when the price of grapes was higher, is to contend for the patently unfair and unreasonable. In view of the payment of ten thousand dollars as a deposit by plaintiff at the commencement of the season and in view of other circumstances of the case, it might well be contended that plaintiff was entitled to the highest market value of Muscat grapes during the entire season.

> *Dabovich v. Emeric,* 12 Cal. 171;
> *Mahart v. Riley,* 17 Cal. 415;
> Benjamin on Sales, Bennett's Am. Ed., note p. 861;
> 1 Sedgwick on Damages, p. 264.

The learned trial judge, however, adopted perhaps a more fair and equitable view of the matter. In his opinion he stated:

"I think that under a contract of the kind here considered where deliveries were to be made from day to day covering a fruit season, the value to the buyer would not be expressed by the high price that might have been obtained for a single car of fruit during the period, but that an average price should be adopted. The cars contained an average each of fifteen tons. The fifty-two cars as to which the defendant was short in his deliveries would have contained seven hundred eighty tons. The difference between the price agreed to be paid, to-wit, $50 per ton, and the average price of $67, would be $17. The loss to the plaintiff, therefore, being $17 per ton, the total amount would be $13,260."

As we have heretofore pointed out, the contract provides that delivery was to begin when the grapes matured. The evidence discloses that defendant had an abundance of grapes, sufficient to make full performance of his contract, during the entire season, and that he sold quantities of these grapes to other persons at a higher price than he was to receive from plaintiff under the contract. The fault was entirely his in not performing under his contract when he had the grapes in sufficient quantities and in proper condition to do so. He had no right, under the agreement, to take chances on the occurrence of rain or of any other contingency. In the case of *Bill v. Fuller*, 146 Cal. 50, a defendant bought oranges on the trees and permitted them to remain thereon until they became "ripe and unfit for market." The fault being that of the purchaser, the California Supreme Court held that he must bear the loss. In this case, the fault was that of the seller in

permitting the grapes to remain on the vines for such a period of time that they became unfit for shipment, and the seller must bear the consequent loss. The contract provided for delivery when grapes were well matured. Obviously when under the contract it was provided that delivery should begin when fruit is well matured, coupled with the obligation of plaintiff in error to make deliveries during the season, and with the plaintiff's pleading that he was at all times ready, able and willing to make delivery, it does not lie in the plaintiff in error's mouth to say that he could sell the grapes to other buyers when the market was above the contract price of defendant in error and thus to his advantage, sell elsewhere, speculate upon the day of delivery, without imposing upon him the resulting loss to the plaintiff in error. By his neglect and failure to perform when he could perform, he must be liable for failure of performance when his grapes, otherwise sound, became ruined by rain damage. Plaintiff in error refused to make further deliveries on, to-wit, October 18, or, at most, October 23, when admittedly the season closed, because admittedly by the terms of the contract performance thereafter was impossible, and we submit that the trial court rightfully used this latter date as the date of the breach and the basis in the calculation of the damages. As said in Grant v. Warren, 31 Cal. App. 459,

> "The law holds him to the measure of damages which he himself prescribed."

Plaintiff in error urges that in fixing upon a fair average price, certain testimony relative to the market

for Muscats during the last few days of the season was not taken into consideration. The court, on the other hand, did not consider the testimony of the witness Foley that at one period during the season the price had reached $100 per ton, or the testimony of the witness Kornblum that about the middle of October the price per ton was over $90. From a consideration of the testimony the court reached the conclusion that $67 was the fair average price of a ton of Muscat grapes and based the calculations thereon; it surely can not be said that there is not ample evidence to support this position.

The California courts have expressly approved the method of striking an average in cases of this general nature for ascertaining damages.

> *Northern Light Co. v. Blue Goose Co.,* 25 Cal. App. 282, 293;
>
> *Grant v. Warren,* 31 Cal. App. 453.

In the Northern Light Co. case, the court says:

> "But it is the doctrine of common justice, as well as of the authorities, that, since the difficulty of ascertaining *exactly* how much plaintiff was injured arose from defendant's breach of its contract, scant attention will be paid to its complaint that greater accuracy was not obtainable."

> C. C. Sec. 3308-3309;
>
> 24 R. C. L. p. 72;
>
> *Shoemaker v. Acker,* 116 Cal. 244;
>
> 8 Cal. Jur. 756.

To sum up this matter, a fair construction of the contract would indicate that deliveries were to com-

mence when the grapes were well matured, were to be continuous thereafter, and were to be completed before natural contingencies put an end to the 1922 grape shipping season. Emerzian had approximately three months within which to complete deliveries; he failed to complete his contract; and the fairest method of ascertaining the damages was that adopted by the court. We submit that the amount of damages was fairly computed.

III. The Court's Finding That the Original Agreement Was Not Modified Is Correct as a Matter of Law.

In the first place, there was no consideration for the so-called modification. The attempted modification was only that defendant should deliver fifteen cars instead of the fifty-five cars that plaintiff was entitled to. There was no advantage and no benefit to plaintiff, but on the other hand it was deprived of the profits from a resale of the grapes to which it was entitled. The very terms of the alleged modification lend themselves to no other construction.

The law clearly holds that a modification of a contract must be supported by a sufficient new or additional consideration. A consideration covered by the original contract will not support, or constitute a consideration for, a modification thereof. The general rule is thus stated in 6 California Jurisprudence, at page 179:

> "Neither the promise to do nor the actual doing of that which the promisor is by law, or subsisting

contract, bound to do, is a sufficient consideration to support a promise made to the person upon whom the legal liability rests, either to induce him to perform what he is bound to do, or to make a promise so to do."

This rule is supported universally by the California authorities.

Scheeline v. Moshier, 172 Cal. 565;
Marinovich v. Kilburn, 153 Cal. 638;
Gordon v. Green, 51 Cal. App. 765;
Mackenzie v. Hodgkin, 126 Cal. 591;
Sullivan v. Sullivan, 99 Cal. 187;
Sidell v. Clark, 89 Cal. 321;
Deland v. Hiett, 27 Cal. 611;
Jordan v. Scott, 38 Cal. App. 739;
Pac. Ry. v. Carr, 29 Cal. App. 722;
Benedict v. Greer-Robbins, 26 Cal. App. 468;
Poetker v. Lowry, 25 Cal. App. 616;
Ellison v. Jackson Water Co., 12 Cal. App. 542;
Main St. Ry. Co. v. L. A. Traction Co., 129 Cal. 301;
Carter v. Rhodes, 135 Cal. 46;
Hibernian etc. Soc. v. Walkenruder, 111 Cal. 471;
Lassing v. Page, 51 Cal. 575;
6 R. C. L. 916;
8 Cyc. 535.

It is suggested in the brief of plaintiff in error that there was additional consideration in the new writing in that the term "subject to car shortage" was not inserted. But in order to excuse performance of a con-

tract, car shortage would have had to be pleaded affirmatively and proved as an excuse for non-performance. This suggested car shortage never became a reality, as shown by the pleadings, and defendant's claimed ability to perform would render nugatory any possible advantage due to any such modification.

Secondly, the authorities are equally clear to the effect that when a modifying agreement is not performed, the modification has no effect. It would be a singular principle indeed that would accord to defendant any advantage upon a modification of a contract when concededly there was no performance under the modification. This proposition is clearly enunciated in *Benedict v. Greer-Robbins,* 26 Cal. App. 468, where the court had before it a modification of a contract by which time for payments was extended upon an automobile sales contract. There had been a default in payments and a suit was instituted in claim and delivery; the court says on page 471 of the opinion:

> "Under the evidence in this case, even conceding validity to the agreement as to the extension of time, it is plain that appellant did not live up to the conditions of that understanding. He did not send in the fifty dollars required of him on July 10th, until July 19th, which was a delay of more than one week. This fact alone would have authorized respondent to have treated the agreement for extension as being abrogated and to insist upon taking advantage of appellant's default which had already continued for more than two months."

In 8 Cyc. 535, the general rule is stated as follows:

> "Upon the breach of the terms of a compromise agreement, or abandonment by one party thereto, the other party may treat the agreement as a nullity and be admitted to his original claim or cause of action."
>
> *Scheeline v. Moshier,* 172 Cal. 571.

Under the facts in the case at bar, there was no benefit to buyer under the alleged modification, and no consideration given therefor. We submit that the so-called modification had no validity whatsoever; that the original contract was not affected thereby, and that the findings of the District Court are correct.

Conclusion.

In conclusion, we submit that the evidence amply justifies the judgment, and that there are no errors in the record.

Respectfully submitted,

EDWARD SCHARY,
KENTON A. MILLER,
LINDSAY & CONLEY,
Attorneys for Defendant in Error.

W. M. CONLEY,
PHILIP CONLEY,
Of Counsel.

No. 4388

United States
Circuit Court of Appeals
For the Ninth Circuit

KARL EMERZIAN, Plaintiff in Error,

vs.

S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation, Defendant in Error.

Petition by Plaintiff in Error for Rehearing After Judgment Affirming Judgment of United States District Court for the Southern District of California, Northern Division

FILED
MAR 14 1925
F. D. MONCKTON,
CLERK

GEO. COSGRAVE,
and
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Attorneys for Plaintiff in Error.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

KARL EMERZIAN,
Plaintiff in Error,

vs.

S. J. KORNBLUM and WILLIAM KORNBLUM, a corporation,
Defendant in Error.

No. 4388

PETITION BY PLAINTIFF IN ERROR FOR REHEARING AFTER JUDGMENT AFFIRMING JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

To the United States Circuit Court of Appeals, Ninth Circuit:

Plaintiff in error respectfully presents to this Court his petition for rehearing, and asks that the judgment affirming the decision of the United States District Court for the Southern District of California, northern division, be reconsidered.

The decision of the District Court was affirmed because there was no stipulation in writing waiving a jury filed by the clerk, as required by Section 649 of the Revised Statutes. Plaintiff in error respectfully submits that the record is entirely sufficient

in this respect and shows in legal effect that such stipulation was filed. Its absence will not, of course, be presumed, since all presumptions are in favor of the regularity of the proceedings in the lower court. It is respectfully submitted that it does not affirmatively appear that a written stipulation was not in existence, but upon the contrary it does appear that the stipulation is in existence. The findings of the trial court (Tr. p. 25) recite:

> "This cause came on regularly for trial on the 28th day of January, 1924, before the court without a jury, a jury trial having been duly waived by the parties", etc., etc.

The judgment (page 29) contains nothing to the contrary; the recital being that

> "a jury trial having been waived by the parties" * * *

Now we respectfully submit that if the record shows that the trial by jury was in fact *duly* waived, this court is bound to presume that the waiver was in writing, nothing to the contrary appearing in the record. That if the trial by jury were *duly* waived, it necessarily follows that it was waived in such manner as the law requires. The word "duly" is thus defined:

> "The word has acquired a fixed legal meaning and when used before any word

> implying action, it means that the act was done properly, regularly, and according to law, or some rule of law. It does not relate to form merely, but includes form and substance, and implies the existence of every fact essential to perfect regularity of procedure."
>
> 19 C. J. 833.

The question at issue seems to be governed by two statutory provisions. Section 566, Revised Statutes, provides that:

> "The trial of issues of fact in the district courts, in all causes except in equity and cases of admiralty and maritime jurisdiction and except as otherwise provided in proceedings in bankruptcy, shall be by jury * * *"
>
> 6 Fed. Stats. Ann., 2d ed. p. 121.
> 3 U. S. Comp. Stats. 1916, 1583.

It is further provided, (649 Revised Statutes):

> "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."
>
> 6 Fed. Stats. Ann., 2d ed., p. 130.
> 3 U. S. Comp. Stats. 1916, 1587.

By the positive provisions of the statute, there is only one way in which the jury can be waived, namely, by written stipulation. When the trial court finds that this waiver was *duly* made it conclusively follows that it was made in writing because that is the only way that, according to the definition quoted, *"implies the existence of every fact essential to perfect regularity of procedure"*. There being nothing in the record to show that this was not done, but the record affirmatively showing that the waiver was duly made, it necessarily follows that it sufficiently appears from the record that the waiver was made as required by law.

There is a striking and noticeable difference between the record in the case at bar and that in other cases where the point is to some extent considered.

In Ford vs. U. S. 260 Fed Rep. at page 658, the recital in the judgment was:

> "and now both parties announce themselves ready for trial, and waive jury and agree to try the case before the court." (658)

Madison County vs. Warren, 106 U. S. 622, 27 L. Ed. 311, says:

> "The rule is well settled that if a written stipulation waiving a jury is not *in some way* (our italics) shown affirmatively in the record, none of the questions decided at the trial can be re-examined here on writ of error."

In Bond vs. Dustin, 28 L. Ed. 835, decided by the United States Supreme Court, the record showed:

> "and the issue joined by consent is tried by the court, a jury being waived".

The Bill of Exceptions recited:

> "The above case coming on for trial, by agreement of parties, by the court without the intervention of a jury"

The decision goes on to say:

> "The most proper evidence of a compliance with the statute is a copy of the stipulation in writing filed with the clerk. But the existence of the condition upon which a review is allowed is sufficiently shown by a statement in the findings of fact by the court, or in the bill of exceptions, or in the record of the judgment entry, that such stipulation was made in writing." (836)

In defining the word *duly* we have confined ourselves to Corpus Juris, but no other authority essentially differs, and Corpus Juris is the latest. Applying the language of the court in Bond v. Dustin, supra, we maintain that the record in this case showing without contradiction that a jury trial was *duly* waived not merely *sufficiently* but *conclusively* shows the existence of the condition on which a review is allowed.

The waiver is shown as stated in Madison County v. Warren, supra, "affirmatively in some way".

Defendant in error has not objected to a review.

We respectfully contend therefore that the finding of the trial court that the jury was duly waived is conclusive on this court, and it conclusively follows that it was waived in the only manner allowed by law, and that the appeal should therefore be considered on its merits; that the plaintiff in error should have his "day in court" before the Circuit Court of Appeals.

GEO. COSGRAVE,
and
L. B. HAYHURST,
Attorneys for Plaintiff in Error.

STATE OF CALIFORNIA, }
County of Fresno. } ss.

I, Geo. Cosgrave, of Fresno, California, hereby certify that I am one of counsel for plaintiff in error in the foregoing petition for re-hearing. That in my judgment the said petition for re-hearing is well founded. That it is not interposed for delay.

Dated: March 9, 1925.

Geo. Cosgrave

No. 4389

United States

Circuit Court of Appeals

For the Ninth Circuit.

MASSACHUSETTS TRUST COMPANY, a Corporation,

Appellant,

vs.

LOON LAKE COPPER COMPANY, a Corporation, and J. WEBSTER HANCOX, as Receiver of the LOON LAKE COPPER COMPANY,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

FILED DEC 2 [illegible] F. D. MONCKTON

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4389

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Answer of Loon Lake Copper Company...... 14

Answer to Original Bill to Foreclose........ 16

Appeal Bond 44

Assignments of Error 39

Certificate of Clerk U. S. District Court to Transcript of Record 60

Citation on Appeal 46

Decree 26

Deposition of Arnold Whittaker............. 30

EXHIBITS:

Exhibit No. 1—Letter Dated December 4, 1918, Guy A. Ham to Frederick W. Dewart 58

Exhibit No. 3—Letter Dated December 10, 1918, F. W. Dewart to Guy A. Ham.. 59

Exhibit No. 4—Trust Deed Dated November 15, 1918, Loon Lake Copper Company to Massachusetts Trust Co. 52

Names and Addresses of Attorneys of Record.. 1

Order Allowing Appeal..................... 43

Order Settling Statement.................. 37

Index. Page

Order to Strike from Answer 25
Original Bill to Foreclose.................... 2
Petition for Allowance of Appeal 41
Praecipe for Transcript of Record............ 48
Stipulation Re Transmission of Transcript of
Evidence and Exhibits.................. 50

TESTIMONY ON BEHALF OF PLAINTIFF:
DEWART, FREDERICK W. 33
Cross-examination 33

TESTIMONY ON BEHALF OF DEFENDANTS:
HANCOX, J. W. 35
KULZER, ALBERT 36

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Attorneys for Defendants.

In the District Court of the United States for the Eastern District of Washington, Northern Division, Sitting at Spokane, Washington.

IN EQUITY—No. E-4220.

MASSACHUSETTS TRUST COMPANY, Trustee,

Complainant,

vs.

LOON LAKE COPPER COMPANY and J. WEBSTER HANCOX, as Receiver of the LOON LAKE COPPER COMPANY,

Defendants.

ORIGINAL BILL TO FORECLOSE.

To the Honorable Judge of the District Court of the United States for the Eastern District of Washington, Northern Division:

Massachusetts Trust Company, a corporation, duly organized and existing under the laws of the Commonwealth of Massachusetts, and with its principal place of business at Boston in the County of Suffolk in said Commonwealth, and a citizen of said Commonwealth, as Trustee, brings this its bill of complaint against Loon Lake Copper Company, a corporation, duly organized and existing under the laws of the State of Washington, with its principal place of business at Spokane, in the County of Spokane, in the State of Washington, and a citizen of said State.

Your orator is informed and believes and therefore alleges that in an action by a creditor against the Loon Lake Copper Company, defendant herein, J. Webster Hancox was heretofore appointed Receiver of the said Company by the Superior Court of the State of Washington, in and for the County of Spokane, and that the said Hancox is a citizen of the State of Washington, residing at Spokane, and is now acting as such Receiver, and [1*] therefore your orator complains and says as follows:

1. That your orator, Massachusetts Trust Company, is a corporation duly organized and existing

*Page-number appearing at foot of page of original certified Transcript of Record.

under the laws of the Commonwealth of Massachusetts, with its principal place of business at Boston in the County of Suffolk in said Commonwealth, and is a citizen of said Commonwealth of Massachusetts.

2. The defendant, Loon Lake Copper Company, is a corporation duly organized and existing under the laws of the State of Washington, with its principal place of business in the City of Spokane, in the County of Spokane, and the State of Washington, and is a citizen of said State of Washington.

3. The defendant, J. Webster Hancox, as Receiver of the Loon Lake Copper Company, was heretofore appointed as such Receiver by the Superior Court of the State of Washington in and for the County of Spokane, and is now acting as such Receiver; that the said J. Webster Hancox is a resident of the City of Spokane, State of Washington, and a citizen of the State of Washington.

4. That on or about the 4th day of December, 1918, and on various dates thereafter, said defendant, Loon Lake Copper Company, by and with the authority of its Board of Trustees, and with the concurrence and consent of the owners and holders of a majority of its capital stock, made, executed and delivered its negotiable bonds to the aggregate amount of $90,000 par value, consisting of —— bonds for the principal sum of $1000 each and —— bonds for the principal sum of $100 each, said bonds being dated and issued as of November

15, 1918, and becoming due and payable on the 15th day of November, 1921; by the terms of each of which bonds said Loon Lake Copper Company acknowledges itself to owe and for value received promised to pay to the bearer thereof, or in case said bonds should be registered as provided in the Trust Indenture [2] or mortgage given to secure the same, hereinafter set forth, to the registered owner thereof the sum of $1000 (or $100 as the case may be), in gold coin of the United States of America of the then present or equal standard of weight and fineness at the Massachusetts Trust Company, in the City of Boston, Massachusetts, together with interest thereon at the rate of eight per centum per annum, payable semi-annually in like gold coin on the fifteenth day of May and November at said Massachusetts Trust Company in Boston, upon presentation and surrender of the respective interest coupons thereto annexed as they severally become due, both principal and interest of said bonds being payable without any deduction so far as permitted by law for any tax or taxes, except any Federal Income tax in excess of two per cent which, under any present or future law of the United States of America, the promisor might be required to pay thereon or to retain therefrom. The form and tenor of said bonds are set forth at large in the mortgage or deed of trust or trust indenture given to secure the same, hereinafter set forth and referred to.

5. That on or about the fourth day of December, 1918, said Loon Lake Copper Company, being

thereunto duly authorized by the action of its Board of Trustees, and with the concurrence and consent of the owners and holders of the majority of the shares of its capital stock, duly made, executed, acknowledged and delivered to your orator, Massachusetts Trust Company, Trustee, a certain Trust Indenture dated the 15th day of November, 1918, wherein and whereby, in order to secure the due and punctual payment of said several bonds for the aggregate principal amount of $90,000 and the interest thereon, at any time issued and outstanding, according to their purpose, tenor and effect, and to secure the performance and observance of each and every of the covenants and conditions in said mortgage or trust [3] indenture mentioned, said Loon Lake Copper Company granted, bargained, sold, released, conveyed, assigned, transferred and set over, mortgaged and pledged unto and with your orator, Massachusetts Trust Company, as Trustee as therein provided, all of the property and real estate which is set forth and described in said mortgage or trust indenture, and subject to all the terms and conditions of said mortgage or trust indenture as hereinafter set forth at large, and your orator hereby asks leave to refer to the description of the real estate and property therein contained, with the same force and effect as if said descriptions were here inserted and specifically set forth. Also all other property and property rights of whatsoever character and nature, and wherever situated, real, personal or mixed, at the date of

said mortgage or trust indenture, or at any time thereafter acquired, owned, held, possessed or enjoyed by said Company, unto your orator Massachusetts Trust Company, but in trust nevertheless for the equal and proportionate benefit and security of all present and future holders at any time of any of the bonds above mentioned, and the interest coupons appertaining thereto, and to secure the payment of such bonds and the interest thereon, when payable, in accordance with the provisions thereof, and to secure the performance of and compliance with the covenants and conditions of said indenture. Said mortgage or trust indenture dated November 15, 1918, as executed by the parties thereto, and the several certificates of acknowledgment thereunto appended, was and is in the words and figures following, to wit: [4]

Said mortgage or trust indenture was duly delivered to your orator by the Loon Lake Copper Company, on or about the 4th day of December, 1918, and was duly filed for record in the office of the Auditor of Stevens County, Washington, on December 11, 1918, and recorded in Book 34 of Mortgages at page 7, and was also duly filed as File No. 12199, in the said office of the Auditor of Stevens County, Washington, and properly indexed as a chattel mortgage, on December 11, 1918.

6. Your orator, Massachusetts Trust Company, duly accepted the trust created in and by this mortgage or trust indenture and was then and is now fully authorized and empowered to take and hold in trust the property conveyed to it thereby

and to execute the trusts reposed in it under and by virtue of the provisions thereof.

7. That on or about the 4th day of December, 1918, and on various days and dates thereafter, the said Loon Lake Copper Company duly executed of the issue of bonds described in said mortgage—bonds each of the sum of $1000—and—bonds each of the sum of $100—and delivered all of said bonds to your orator, Massachusetts Trust Company as Trustee, under said trust indenture or mortgage, and said bonds were duly certified by said Massachusetts Trust Company, Trustee, in all respects as provided in said mortgage or trust indenture, and the bonds of the aggregate par value of $84,300, together with the interest coupons thereto attached, were, as your orator is informed and believes and charges the fact to be, duly sold and delivered by the Loon Lake Copper Company, for a valuable consideration, in accordance with the provisions of said mortgage or trust indenture, and the said bonds of the aggregate par value of $84,300, together with interest coupons thereunto attached, are now outstanding in the hands of divers persons and corporations who are now the legal owners and holders thereof for value; and your orator is advised [5] and avers and alleges that said bonds and coupons so issued as aforesaid and now outstanding are now in all respects valid and outstanding obligations of the Loon Lake Copper Company and are entitled to the benefit and security of said mortgage or deed of trust, and that there is now due and owing thereon the principal sum of $84,300,

with interest thereon at the rate of eight per centum per annum from November 15, 1918.

8. Your orator further avers and shows that said mortgage or trust indenture heretofore mentioned, was and now is a valid and existing lien upon all of the property described in or intended to be conveyed or covered thereby, according to the tenor and effect thereof, said mortgage is a valid and existing lien as aforesaid upon all of the property and property rights of whatsoever character and nature and wheresoever situated, real, personal and mixed, owned, held, possessed or enjoyed by said Loon Lake Copper Company, whether specifically described or mentioned in said mortgage or not.

9. Your orator further shows and alleges that on May 15, 1919, and on each and every interest date thereafter, default was made in the payment of the interest installment then due and payable on the said bonds of the Loon Lake Copper Company then outstanding for the principal amount of $84,300, according to the tenor and effect of said bonds, and that on November 15, 1921, default was also made in the payment of $84,300, the principal of the bonds then outstanding, according to the tenor and effect of said bonds.

Your orator further alleges that on none of the dates mentioned were funds provided by the Loon Lake Copper Company, or by any person in its behalf, for the payment of the amounts then due on said outstanding bonds, and that on said dates respectively, demands were made for the payment of the amounts so due, but said payment thereof

was refused, and your [6] orator avers that said defaults in the payment of the amounts aforesaid, which became due and payable as aforesaid, have continued to this time.

Your orator further avers that in accordance with the terms of said mortgage or trust indenture, there is now due and owing upon said bonds the entire principal sum of $84,300, together with interest thereon at the rate of eight per centum per annum from November 15, 1918, in accordance with the tenor and effect of said bonds and the terms and provisions of said mortgage or deed of trust, and your orator as Trustee, as aforesaid, is now entitled to a foreclosure of said mortgage or trust indenture upon all property subject to the lien thereof, as hereinbefore set forth, and files this, its bill of complaint, for that purpose.

10. Your orator further avers that the value of said mortgaged property is far less than the face amount of the bonds due and unpaid and secured by said trust indenture to your orator hereinbefore set forth.

11. Your orator is informed and believes that the defendant named, J. Webster Hancox as Receiver of the Loon Lake Copper Company, has, or claims to have, some interest in the property or real estate described in, or intended to be covered by, the said mortgage or trust indenture, but such interest, if any, is subsequent, inferior and subject to said mortgage or trust indenture.

FORASMUCH THEREFORE, as your orator is without remedy in the premises, according to

the strict rule of the common law, and can only have relief in a Court of Equity where matters of this kind are properly cognizable, your orator prays the aid of this Honorable Court, to the end:

(1) That the said defendants, and each of them, may be required to make answer unto all and singular the matters hereinbefore stated and charged, as fully and particularly as if thereunto [7] particularly interrogated, but not under oath, answer under oath being hereby expressly waived.

(2) That an accounting may be taken of all the property subject to the lien of said mortgage or trust indenture, and that said mortgage or trust indenture may be decreed to be a valid lien upon all and singular the real estate and other property subject to the lien thereof as hereinbefore alleged and shown, together with all the appurtenances, rights and privileges thereunto belonging or in anywise appertaining, including all improvements and additions thereto made since the date of said mortgage or trust indenture, and also including all property acquired by the said Loon Lake Copper Company since the date of said mortgage.

(3) That the said Loon Lake Copper Company may be decreed to pay by a short day to be fixed by this Honorable Court, unto your orator for the use and benefit of the bondholders under the aforesaid mortgage or trust indenture, the principal of said bonds and all interest due and payable on said bonds together with all costs and expenses in this suit incurred and contracted, including the compensation of your orator and its attorneys and so-

licitors, and in default thereof that the said Loon Lake Copper Company, and any other defendant herein, and all persons and corporations claiming under them or any of them, may be forever barred and foreclosed of all right and equity of redemption and claim in and to said mortgaged premises and property and every part and parcel thereof, and that all and singular of said mortgaged premises and property, together with the appurtenances and fixtures, rights and privileges belonging or thereunto appertaining in said mortgage described, or subject to the lien thereof as hereinbefore set forth, may be sold under a decree of this Honorable Court, and that the proceeds of any such sale may be applied as follows, to wit:

First. To the payment of all costs, fees and expenses of this suit including all reasonable fees and expenses of the Trustee, together with reasonable attorneys or solicitors' fees and all costs of advertising sale and conveyance

Second. To the *pro rata* payment of all interest coupons remaining unpaid, and interest thereon at the rate of eight per centum per annum.

Third. To the *pro rata* payment of the principal of the bonds issued hereunder remaining unpaid, in accordance with the provisions of said mortgage or trust indenture; the surplus of the purchase money, if any, to be paid to the Loon Lake Copper Company, or to whomsoever shall be entitled thereto.

Fourth. That upon any such sale any purchaser for or in settlement or payment of the purchase price of the property purchased, may be permitted

to use and to apply any of said bonds secured by said mortgage or trust indenture and any unpaid interest coupons thereto attached, by presenting such bonds and coupons in order that there may be credited thereon the sums applicable to the payment thereof out of any of the proceeds of said sale to the owner of said bonds and coupons as his ratable share of such net proceeds, and that upon such application said purchaser may be credited on account of such purchase price payable by him, with the portion of such net proceeds that shall be applicable to the payment of and that shall have been credited upon the bonds and coupons so presented, and that at any such sale any bondholders may bid for and purchase said property and make payment therefor as aforesaid, and upon compliance with the terms of sale may hold, retain and dispose of said property without further accountability; and your orator further prays that an accounting may be taken of the bonds secured by said mortgage or trust indenture and of the amount due upon said bonds for principal and interest, and [9] of the amounts due for expenses of your orator and of its attorneys and solicitors herein; and that the Loon Lake Copper Company and all other persons claiming by, through or under it, may be decreed to make such transfer or conveyance to the purchasers of said property at any sale to be ordered by this Honorable Court as may be necessary and proper to put them or either of them in possession and control of said property; and that your orator may have such other and further relief in the premises as the nature

of the circumstances of this case may require and to this Honorable Court shall seem meet.

May it please the Court to grant unto your orator a writ of subpoena in chancery to be issued out of and under the seal of this court directed to the defendants, requiring them to appear on a day certain before this Court, and then and there full, true and correct answer make to all and singular the allegations herein, but not under oath, answer under oath being hereby expressly waived, and to perform and abide by all such orders and decrees of this Court that the Court may enter herein.

MASSACHUSETTS TRUST COMPANY,
Trustee,
By F. W. DEWART,
Its Solicitor. [10]

United States of America,
Eastern District of Washington,
Northern Division,—ss.

State of Washington,
County of Spokane,—ss.

F. W. Dewart, being first duly sworn, deposes and says he is the solicitor of and the duly authorized agent in this behalf of the Massachusetts Trust Company, complainant in the above-entitled cause, and that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true, except as to the matters therein stated to be alleged on information and belief, and that as to such matters he believes the same to be true.

F. W. DEWART.

Subscribed and sworn to before me this 18th day of October, 1923.

[Seal] L. H. BROWN,

Notary Public in and for the State of Washington, Residing at Spokane.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 18, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [11]

In the District Court of the United States, in and for the Eastern District of the State of Washington, Northern Division, Sitting at Spokane.

IN EQUITY—No. E-4220.

MASSACHUSETTS TRUST COMPANY,

Plaintiff,

vs.

LOON LAKE COPPER COMPANY, a Corporation, and J. WEBSTER HANCOX, as Receiver for Said LOON LAKE COPPER COMPANY,

Defendants.

ANSWER OF LOON LAKE COPPER COMPANY.

Comes now the Loon Lake Copper Company, a corporation, one of the defendants herein, and for

answer to the bill of complaint of plaintiff admits all of the allegations of said complaint.

LAWRENCE H. BROWN,
WILLIAM C. MEYER,

Solicitors for Defendant Loon Lake Copper Company.

Service admitted this 13th day of February, 1924.

SAM'L R. STERN,
ALBERT KULZER,

Attorneys for J. Webster Hancox, Receiver.

Filed in the U. S. District Court, Eastern District of Washington. Feb. 14, 1924. Alan G. Paine, Clerk. [12]

In the District Court of the United States for the Eastern District of Washington, Northern Division, Sitting at Spokane, Washington.

IN EQUITY—No. ——.

MASSACHUSETTS TRUST COMPANY, Trustee,

Plaintiff,

vs.

LOON LAKE COPPER COMPANY and J. WEBSTER HANCOX, as Receiver of the LOON LAKE COPPER COMPANY,

Defendants.

ANSWER TO ORIGINAL BILL TO FORECLOSE.

To the Honorable J. STANLEY WEBSTER, Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division:

The answer of J. Webster Hancox, as receiver of the Loon Lake Copper Company to the bill of complaint:

Comes now J. Webster Hancox, as Receiver of the Loon Lake Copper Company, and says for answer thereto:

1. Defendant in answer to paragraph 1 admits each and every allegation, matter and thing contained in said paragraph 1 of said bill.

2. Defendant in answer to paragraph 2 admits each and every allegation, matter and thing contained in said paragraph of said bill.

3. Defendant in answer to paragraph 3, admits each and every allegation, matter and thing contained in said paragraph of said bill.

4. Defendant in answer to paragraph four, admits that the Loon Lake Copper Company made, executed and delivered negotiable bonds, as alleged in said paragraph, dated November 15th, 1918, and due and payable on the 15th day of Nevember, 1921. Defendant states that he has no knowledge or belief as to the allegation that any of these bonds were issued on or [13] about the 4th day of December, 1918, and therefore denies the same; admits each and every other allegation in said paragraph.

5. Defendant in answer to paragraph 5, admits that the Loon Lake Copper Company executed a trust indenture which bore date November 15th, 1918, but denies that the same was executed and delivered to the Massachusetts Trust Company, Trustee, on the 4th day of December, 1918, as alleged in line 20, page 3, and again on lines 1, 2 and 3 of page 36, of said paragraph, and further denies that the copy of said trust deed or indenture set out in said paragraph is a true and correct copy of said deed as executed by the Loon Lake Copper Company; further admits that said instrument was filed as a chattel mortgage, as set forth in lines 3, 4, 5, 6, 7 and 8, of page 36 of said paragraph.

6. Defendant in answer to paragraph six admits the allegations and things contained in said paragraph.

7. Defendant in answer to paragraph 7 denies that on the 4th day of December, 1918, the Loon Lake Copper Company executed the instruments therein set forth, but admits that said instruments were executed on and after the 15th day of November, 1918.

8. Defendant in answer to paragraph 8 admits that said mortgage or trust indenture is a valid and existing lien against the real property described therein, but defendant denies that said mortgage or trust indenture is a valid or existing lien as to any of the personal property owned at the time the said instruments were executed, or acquired thereafter, by the said Loon Lake Copper Company.

9. Defendant in answer to paragraph 9, admits the allegations therein contained as to the nonpayment of the bonds as therein alleged, but denies that the plaintiff is entitled to foreclose said mortgage, except as against the real property of the Loon Lake Copper Company, as set forth by defendant in paragraph 8 of this answer. [14]

10. This defendant in answer to paragraph 10 alleges that he has no knowledge or belief as to the truth of the allegations therein set forth, and therefore denies the same.

11. Defendant in answer to paragraph 11 admits that the claim of said plaintiff to foreclose his lien against the real property is superior to that of this defendant, but denies the claim of said mortgage or trust deed is superior to the claim of the receiver herein or that the plaintiff herein has any right whatsoever or any lien upon the personal property belonging to said Loon Lake Copper Company.

As a FIRST affirmative answer and further defense to the complaint of plaintiff the defendant alleges:

That the Loon Lake Copper Company made, executed and delivered a mortgage or trust indenture in which the plaintiff was made trustee, but alleges that said instrument was made and executed on or about the 27th day of November, 1918, and filed for record on December 13th, 1918, and denies that said mortgage or trust indenture is a valid lien against the personal property of the Loon Lake Copper Company owned by it at that time, or after-

wards acquired by it; alleges that the lien of said instrument is void as to this receiver, who represents the creditors of said corporation, for the reason that said instrument was not filed as a chattel mortgage with the auditor of Stevens County, Washington, where said personal property was and is situated within ten days after the date of execution of said chattel mortgage, to wit, within ten days after the 27th day of November, 1918, all as required by the statutes of the State of Washington relating to the filing of chattel mortgages, Sections 3780 and 3781 of Remington Compiled Statutes of the State of Washington.

Defendant as a SECOND affirmative answer and a further defense to the complaint of plaintiff alleges: [15]

That the mortgage or trust indenture set out in plaintiff's complaint does not constitute a valid lien, as against any personal property acquired by the Loon Lake Copper Company after the time of the executing of the mortgage or trust indenture set forth in plaintiff's complaint, which mortgage or Trust Deed was executed on or about November 27th, 1918, and this defendant alleges that all of the following described property now located and situated on the property belonging to the Loon Lake Copper Company in the County of Stevens, State of Washington, was acquired by said company after the executing of the said instrument. That the following is a list of the property acquired since and on which defendant alleges the lien of plaintiff's mortgage does not exist:

IR10 15x9x12 Belt Driven Compressor.
1–36″x6′ Aid Receiver.
ER–1 6x4 Belt Driven Compressor.
1–5″ Cell Ziegler Flotation Machine.
1–5″ Cell Ziegler Flotation Machine.
2–4x4 Union Iron Wks. Ball Mills (Nee.
1–20x6 Dorr Thickner.
1–4′ 3 leaf American Filter.
1–5x7 Triplex Goulds Pump.
1–15x9 Blake Crusher.
1–24″ Symons Disc Crusher.
1–10x10 Steam Engine.
1–8½x10 Ottumwa Non-reversible Hoist.
1–35 H. P. D. C. Generator.
Head & Foot pulleys and 30 Troughing rolls for 16″ conveyor.
6 Cylinder Marine Type Gas Engine.
All tools, marine type Gas Engine.
together with all mining, blacksmith, office and other equipment and all personal property of every nature, owned by said Loon Lake Copper Company.

As a THIRD affirmative answer and further defense to the complaint of plaintiff, this defendant alleges:

That at the time of executing said mortgage the said mortgage, said bonds, and trust deed, the only consideration which passed to the said Loon Lake Copper Company for executing the same was as follows: That the said Loon [16] Lake Copper Company executed notes or bonds, binding itself to pay the total sum of ninety thousand ($90,000.00) dollars at various times and in various amounts, together

with interest thereon at the rate of eight per cent per annum from November 15th, 1918, all as set forth in plaintiff's complaint, and that the said Loon Lake Copper Company received in cash or its equivalent for said bonds, money, property, and other things of value, the sum of Sixty Thousand ($60,000.00) Dollars, and no further or other amount of money or value. That the actual money received by the said Loon Lake Copper Company was the said sum of $60,000,00. That according to the laws of the State of Washington said contract was an usurious contract, and that said plaintiff herein is entitled to judgment on said obligations in the sum of Ninety Thousand ($90,000.00) Dollars, less penalty, and no other or greater sum, as provided by the statutes of the State of Washington covering Usurious Contracts, to wit: Chapter 46, Sections 7299 to 7305, inclusive, Remington's Compiled Statutes of the State of Washington.

As a FOURTH affirmative answer and further defense to the complaint of the plaintiff this defendant alleges:

That he was duly appointed receiver of all the property of the Loon Lake Copper Company, a corporation, in the State of Washington, by the Superior Court of Spokane County, Washington, on the 26th day of December, 1919. That he on said date duly qualified as such receiver, and has been, and still is, the acting receiver of said corporation. That there has been filed with him as such receiver claims in the sum of $14,366.91, of which $9,329.73 are claims for labor performed for said company

prior to his appointment, which labor claims by the statutes of the State of Washington, Remington's Code, Section 1149, are superior to the lien of plaintiff's trust deed; further, that there [17] has accumulated taxes against the property under his control in Stevens County, Washington. That by action duly authorized he brought suit to have the taxes on the said property adjusted and that there is now due and owing said Stevens County, Washington, for taxes against the said property a sum in excess of One Thousand ($1,000.00) Dollars. That said property would long since have been sold for taxes had not this receiver brought said action above referred to. That from the time of this defendant's appointment as such receiver, to wit, on December 26th, 1919, and up until the instituting of this action, he has been unable to get any word from the owner or trustee looking toward the settling of the affairs of this company, nor any assistance whatsoever from said parties, either in preserving the property or disposing of the same. Also he has been informed by those most heavily interested that the matter has been charged off as a loss and that since his appointment he has been and still is preserving and holding said property intact for all parties interested therein. That said receiver has performed various services for all the creditors and lienholders of the said Loon Lake Copper Company, but that his compensation has not as yet been fixed by the Superior Court under whose direction said receiverhsip has been conducted, and that the costs of said receivership have not yet been ascertained by said Superior

Court. This defendant alleges that said costs are a prior lien to the lien of the trust deed as set forth in plaintiff's complaint, and that said foreclosure if allowed against any of the property of the Loon Lake Copper Company for any amount should be allowed subject to the costs and compensation of the receiver, to be determined by the Superior Court of Spokane County, Washington, under whose direction said receivership is being directed. [18]

Having thus fully answered all the matters and things contained in the bill, this defendant prays that said bill be dismissed as to that part of plaintiff's complaint which seeks to foreclose the trust deed therein referred to as a lien against the personal property owned by the Loon Lake Copper Company, and now the hands of this defendant as Receiver of said company, and that the court find that there is nothing due said Massachusetts Trust Company as Trustee under said bond issue, as set forth in plaintiff's complaint, and that any foreclosure permitted by this court be permitted against the real property only of the Loon Lake Copper Company, and be made subject to the costs, including compensation for the Receiver, in the Superior Court of the State of Washington, and subject to the lien of the labor claimants filed with the receiver herein, and that this defendant have judgment for his costs in this behalf incurred.

SAMUEL R. STERN,
ALBERT I. KULZER,
Attorneys for Receiver. [19]

State of Washington,
County of Spokane,—ss.

J. Webster Hancox, being first duly sworn, upon oath deposes and says that he is the Receiver of the Loon Lake Copper Company, a corporation, and defendant named in the above-entitled action; that he has read the foregoing Answer to original bill to foreclose, knows the contents thereof, and that the same is true, as he verily believes.

J. WEBSTER HANCOX.

Subscribed and sworn to before me this 15th day of December, 1923.

[Seal] W. C. LOSEY,
Notary Public in and for the State of Washington,
Residing at Spokane.

Filed in the U. S. District Court, Eastern District of Washington. Dec. 19, 1923. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [20]

In the District Court of the United States, in and for the Eastern District of the State of Washington, Northern Division, Sitting at Spokane.

IN EQUITY—No. E-4220.

MASSACHUSETTS TRUST COMPANY,
Plaintiff,

vs.

LOON LAKE COPPER COMPANY and J. WEBSTER HANCOX, as Receiver of LOON LAKE COPPER COMPANY,
Defendants.

ORDER TO STRIKE FROM ANSWER.

Now, this day the plaintiff having withdrawn his motion to strike from the answer of defendant, the second, third and fourth affirmative answers, and defenses, and the cause coming on to be heard on the other motion by plaintiff to strike from the answer of defendant J. Webster Hancox, as receiver, and the Court having heard the said motion,—

IT IS ORDERED that there be stricken from the answer of defendant J. Webster Hancox, as receiver, the matter on page six, included between the words "That from the" in line eight, down to the word "Therein" in line 19, both inclusive.

The other part of said motion is hereby denied.

Dated this 16th day of January, 1924.

J. STANLEY WEBSTER,
Judge.

O. K. as to form.

J. WEBSTER HANCOX.

Filed in the U. S. District Court, Eastern District of Washington. Jan. 17, 1924. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [21]

In the District Court of the United States, in and for the Eastern District of the State of Washington, Northern Division, Sitting at Spokane.

IN EQUITY—No. E-4220.

MASSACHUSETTS TRUST COMPANY, a Corporation,

Plaintiff,

vs.

LOON LAKE COPPER COMPANY, a Corporation, and J. WEBSTER HANCOX, as Receiver for Said LOON LAKE COPPER COMPANY, a Corporation,

Defendants.

DECREE.

This cause coming regularly on to be heard on the 11th day of March, 1924, the plaintiff appearing by its attorney, F. W. Dewart, and the defendant, the Loon Lake Copper Company, a corporation, appearing by its attorneys, Lawrence H. Brown and W. C. Myers, and J. Webster Hancox, the Receiver of the Loon Lake Copper Company, appearing in person, and by Samuel R. Stern and Albert I. Kulzer, his attorneys, and the parties having introduced their testimony, and the Court being fully advised in the premises, finds that it has the jurisdiction of the parties and of the subject matter.

The Court further finds that the Loon Lake Copper Company, a Washington corporation, made,

executed and delivered a trust deed for the purpose of securing an issue of ninety thousand ($90,000.00) Dollars worth of bonds, which bonds evidenced an actual loan of Sixty Thousand ($60,000.00) Dollars. That said bonds were dated November 15th, 1918. That said deed of trust was signed, sealed, acknowledged and delivered by the Loon Lake Copper Company on November 27th, 1918, and accepted by the Massachusetts Trust Company on or about November 27th, 1918, and not later than November 29th, 1918, and that the said trust deed was executed by both parties on or about the 27th day of November, 1918, and not later than November 29th, 1918. [22]

The Court further finds that said deed of trust was filed for record as a real estate mortgage in the County of Stevens, State of Washington, on the 11th day of December, 1918, and recorded in Book 34 of Mortgages, at page 7, and that it was duly filed as a chattel mortgage in the said office of the Auditor of Stevens County, Washington, on December 11th, 1918.

The Court finds that the trust deed covers the following described real estate, to wit:

> The North half (N.½) of Section Thirty-three (33), Township thirty-one (31) North, Range forty-one (41) East Willamette Meridian, excepting about ten acres in the eastern portion belonging to other parties, containing three hundred and ten (310) acres, more or less, in Stevens County, State of Washington,

together with the buildings, plants, mills, dredges, motors, machinery, electrical appliances, poles, wires, conduits, merchandise and other equipment, and all other real estate and tangible personal property of every sort and description, whether then owned or thereafter acquired by the company.

The Court finds that the said trust deed does not constitute a lien on any of the personal property owned by the said Loon Lake Copper Company as against the Receiver and the creditors of the Loon Lake Copper Company, and that said trust deed is void as to them for the reason that said trust deed was not filed as a chattel mortgage within the time required by the laws of the State of Washington, to wit, within ten days after the execution of said instrument, all as required by Section 3780 of Remington's Compiled Statutes of the State of Washington.

The Court further finds that no part of the principal of ninety thousand ($90,000.00) dollars, or any interest thereon, [23] has been paid, and that the said Loon Lake Copper Company is in default by reason of said failure to pay the principal and interest, according to the terms of the bond.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff be and hereby is permitted to foreclose said trust deed against the real property belonging to said Loon Lake Copper Company, and hereinafter described,

and that the petition of said plaintiff, seeking to foreclose said mortgage against the personal property of the Loon Lake Copper Company, and now in the hands of the defendant, J. Webster Hancox, Receiver, be and the same is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the premises described in plaintiff's bill of complaint, and hereinafter described, be sold in the manner provided by law, and the proceeds arising from said sale be applied upon the amount found due plaintiff, with costs, attorney's fees, and accrued costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that whatever right, title, interest, or claim that the defendants, or either of them, may have in or to the real estate hereinafter described is subject, inferior and subordinate to plaintiff's mortgage lien, and that the said defendants be, and they are, hereby estopped and foreclosed from having or exercising any right, interest, lien or estate in and to the said presises, except the right of redemption, as provided by statute, and it is further ordered that any party to this action may become a purchaser at said sale.

That the premises described in plaintiff's mortgage, and to be sold by the United States Marshal for the Eastern District of Washington, are described as follows, to wit:

> The North half (N.½) of Section thirty-three (33), Township thirty-one (31) North, Range forty-one (41) East of the Willamette Meridian, excepting about ten acres in the

eastern portion belonging to other parties, containing three hundred and ten (310) acres, more or less, in Stevens County, State of Washington.

Dated this 6th day of ——.

J. STANLEY WEBSTER,
District Judge.

Filed in the U. S. District Court, Eastern Dist. of Washington. May 6, 1924. Alan G. Paine, Clerk. A. P. Rumburg, Deputy. [24]

DEPOSITION OF ARNOLD WHITTAKER.

The following testimony of ARNOLD WHITTAKER was taken by deposition:

My name is Arnold Whittaker. I am 41 years of age, and reside at Winchester, Massachusetts.

On the 15th day of November, 1918, I was Secretary of the Massachusetts Trust Company, a Massachusetts corporation, having its principal place of business at Boston, Massachusetts. I continued as such secretary until December 3, 1919, when I became Treasurer of the Company, which is my present position, together with that of Vice-President.

I am the Arnold Whittaker who as Secretary of the Massachusetts Trust Company, acknowledged the deed of trust executed by the Loon Lake Copper Company to the Massachusetts Trust Company on November 29, 1918. Said deed of trust was actually delivered to and accepted by the Massachusetts Trust Company on December 4, 1918.

(Deposition of Arnold Whittaker.)

It is the practice of the Massachusetts Trust Company not to accept any trust or execute any legal document under which it is obligated in any way until such document has been examined and approved by its counsel. This deed of trust was therefore submitted to Mr. Guy A. Ham, an Attorney-at-law, 24 Milk Street, Boston, Massachusetts, for his examination and approval before it was finally accepted and delivered by the Massachusetts Trust Company. The document was handed to Mr. Ham about November 29, 1918, and on December 4, 1918, it was approved by Mr. Ham, and on that date the formal delivery was actually accepted by the Massachusetts Trust Company and Mr. Ham was instructed to forward the instrument to Frederick W. Dewart, Esq., 801–802 Old National Bank Building, Spokane, Washington, to be recorded. This [25] instrument, that is, the deed of trust was actually acknowledged on November 29, 1918, but as I just stated, it was not actually accepted and delivered until December 4, 1918, on which date, it was formally approved by our counsel and the delivery was made by him in accordance with our instructions.

On his cross-interrogatories, Mr. ARNOLD WHITTAKER testified as follows:

I arrived at the date of December 4, 1918, as the date on which this trust deed was delivered to the Massachusetts Trust Company, by making an examination of our records to refresh my personal recollection of the transaction, but my recollection

(Deposition of Arnold Whittaker.)
of such delivery date was verified by such examination, and also by the fact that I ascertained through my own personal investigation that on said date—namely, December 4, 1918,—Guy A. Ham, the counsel for the Massachusetts Trust Company, forwarded it by mail at my request to Frederick W. Dewart, Spokane, Washington, for the purpose of being recorded by Mr. Dewart with the proper officials in the State of Washington, which letter from Mr. Ham to Mr. Dewart is made a part of this my answer (being Plaintiff's Exhibit 1, hereinafter set out). The deed of trust contains the following provision: "Although this indenture is dated for convenience and for the purpose of reference as of November 15, 1918, the actual date of the execution hereof is November 27, 1918." That provision is a statement of the facts relative to the actual date of signature, and was inserted in the deed of trust to explain the apparent discrepancy in dates. The reason the deed of trust was not delivered on either of said dates, but was actually delivered on December 4, 1918, is, as I have previously stated, because the instrument was submitted to Guy A. Ham, counsel for the [26] Massachusetts Trust Company, for his approval, and after he had approved it, the delivery of the deed of trust was actually accepted on December 4, 1918. This deed of trust was in the possession of counsel for the Massachusetts Trust Company between November 29, 1918, and December 4, 1918, for the purpose of examination.

(Deposition of Arnold Whittaker.)

After the Massachusetts Trust Company's officials acknowledged the deed of trust, which acknowledgment was on the 29th day of November, 1918, it was submitted to its counsel, Guy A. Ham, Esq., for examination and approval before it was definitely accepted by the Massachusetts Trust Company.

After the instrument was approved by the counsel for the Massachusetts Trust Company, and accepted by it on December 4, 1918, notice of the Massachusetts Trust Company's acceptance being given on that date to the Loon Lake Copper Company, Mr. Ham forwarded it by mail to Frederick W. Dewart, Esq., 801 Old National Bank Building, Spokane, Washington, to be recorded.

The deed of trust was sent by mail to Frederick W. Dewart, Esq., 801 Old National Bank Building, Spokane, Washington, on December 4, 1918, by Guy A. Ham, Esq., counsel for the Massachusetts Trust Company.

On December 4, 1918, our counsel, Guy A. Ham, Esq., delivered the deed of trust by sending it by mail to Frederick W. Dewart, Esq., 801–802 Old National Bank Building, Spokane, Washington, who at that time was counsel and an officer of the Loon Lake Copper Company and requested Mr. Dewart to record the instrument.

Guy A. Ham, counsel for the Massachusetts Trust Company, mailed said instrument with the letter of December 4, 1918 (hereinafter set out as Plaintiff's Exhibit No. 1), [27] addressed to

(Deposition of Arnold Whittaker.)

Frederick W. Dewart, Spokane, Washington. Guy A. Ham, counsel for Massachusetts Trust Company, received a letter dated December 10, 1918, from Frederick W. Dewart of Spokane, Washington, acknowledging receipt of said instrument, which letter (Plaintiff's Exhibit No. 3) is made a part of this deposition. I find no evidence here of any registry receipt from the postoffice ever having been returned. I know of no other correspondence relative to the executing, filing or recording of the trust deed.

The above deposition of Arnold Whittaker was read and received in evidence.

TESTIMONY OF FREDERICK W. DEWART, FOR PLAINTIFF.

FREDERICK W. DEWART, a witness called on behalf of the plaintiff, being sworn, testified as follows:

The letter (Plaintiff's Exhibit No. 1) attached to Mr. Ham's deposition was received by me in Spokane on December 9; the mortgage was forwarded by me on that same date to the county auditor at Colville, in Stevens County, Washington, for recording, and my acknowledgment (Plaintiff's Exhibit No. 3) to Mr. Ham went forward to him on the next day, December 10.

All the money received from the sale of these mortgage bonds was used by the Loon Lake Copper Company in the purchase of machinery and other supplies in the operation of the plant, and

(Testimony of Frederick W. Dewart.)
practically all of the machinery that is there now was purchased with the money from these bonds.

On cross-examination, Mr. Dewart testified:

At that time I was an officer of the Loon Lake Copper Co. All this money was expended after the bond issue was made. All these purchases were made and delivered to [28] the Loon Lake Copper Co. within a year or a little less. I have seen the other officers of the Loon Lake Copper Co. since the execution of this bond and since this suit was started, and they do not have, to my knowledge, any other record than that introduced here, except the trust deed delivered to the Massachusetts Trust Company, and except the letter of acceptance of December 4. That letter of acceptance from the Massachusetts Trust Company, dated December 4, is in Boston. Such a letter was sent to the officials in Boston.

This was an issue of bonds gotten out by the Loon Lake Copper Co. which asked the Massachusetts Trust Company to act as trustee of the bond issue.

TESTIMONY OF J. W. HANCOX, FOR DEFENDANTS.

J. W. HANCOX, a witness for the defendants, being sworn, on direct examination, testified:

I was appointed receiver of the Loon Lake Copper Co. about December 26, 1919, by the Superior Court of Spokane County, Washington, and have been acting as such ever since.

(Testimony of J. W. Hancox.)

All the movable portions of the property that the Massachusetts Trust Company is now asserting title to, were, under my direction, moved to the town of Loon Lake and placed in care of a watchman, so that everything could be preserved for whomsoever might be decreed to be the owner of it. I have performed services as receiver since my appointment. The receivership has not been closed and I have not been paid for my services. The only assets out of which the expenses of the receivership can be realized is this property.

TESTIMONY OF ALBERT KULZER FOR DEFENDANTS.

ALBERT KULZER, a witness for the defendants, being sworn testified on direct examination as follows: [29]

I recently examined the original mortgage on file with the County Auditor at Colville, Stevens County, Washington, and I notice that the last words there—"November 27, 1918"—are in the handwriting corresponding with that of Arnold Whittaker, Secretary, who acknowledged the instrument. That is just in the filling in of the date. The clause itself was typewritten. The instrument was filed December 11.

Filed in the U. S. District Court, Eastern Dist. of Washington. Oct. 30, 1924, —— M. Alan G. Paine, Clerk. By Eva M. Hardin, Deputy. [30]

In the District Court of the United States in and for the Eastern District of the State of Washington, Northern Division, Sitting at Spokane.

IN EQUITY—No. E-4220.

MASSACHUSETTS TRUST COMPANY, Trustee,

Plaintiff,

vs.

LOON LAKE COPPER COMPANY AND J. WEBSTER HANCOX, as Receiver of LOON LAKE COPPER COMPANY,

Defendants.

ORDER SETTLING STATEMENT.

This cause coming on regularly to be heard before the Court for the purpose of settling the statement of evidence and exhibits and the parties having approved said statement and said *statement, exhibits* having been heretofore lodged with the Clerk of this Court,—

NOW, THEREFORE, the Court doth hereby certify that the matters and proceedings contained in the foregoing statement of evidence and exhibits are the matters and proceedings occurring in the above-entitled cause and the same are hereby made a part of the record herein, and that the same contains all exhibits and all the material facts and proceedings heretofore occurring and the evidence received in said cause in anywise material or appurtenant to this appeal.

And it is hereby further certified that said statement of evidence contains all the material evidence and testimony to adduced upon trial of said cause and reduced to narrative form, except where for the sake of clarity, testimony is reproduced *verbatim* which is material to and which was received upon the trial of said cause in connection with the matters and things involved in this appeal.

IT IS THEREFORE HEREBY ORDERED: That the said statement [31] of evidence and exhibits be and the same are hereby certified and allowed as required by Equity Rule 75.

Done in open court this 30th day of October, 1924.

J. STANLEY WEBSTER,
District Judge.

O. K.—WILLIAM C. MEYER,
J. HANCOX,
Receiver and for Sam'l R. Stern and Albert Kulzer, Attorneys for Appellees.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 30, 1924. ——M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [32]

In the District Court of the United States for the Eastern District of Washington, Northern Division, Sitting at Spokane, Washington.

IN EQUITY—No. E-4220.

MASSACHUSETTS TRUST COMPANY, Trustee,

Complainant,

vs.

LOON LAKE COPPER COMPANY and J. WEBSTER HANCOX, as Receiver of the LOON LAKE COPPER COMPANY,

Defendants.

ASSIGNMENTS OF ERROR.

Comes now Massachusetts Trust Company, Trustee, and says that in the decree made and entered in the above-entitled proceeding on May 6th, 1924, there is manifest error and files the following assignments of error committed and happening in said proceeding upon which it will rely in its appeal from said decree.

The Court erred as follows:

1. In holding that the chattel mortgage described in the bill of complaint was executed before the same was accepted by the Massachusetts Trust Company on December 4th, 1918.

2. In failing and refusing to hold that said chattel mortgage was executed on December 4th, 1918.

3. In holding that said chattel mortgage was accepted by the Massachusetts Trust Company on

or about November 27th, 1918, and not later than November 29th, 1918.

4. In failing and refusing to hold that said chattel mortgage was accepted by said Massachusetts Trust Company on December 4th, 1918.

5. In holding that said chattel mortgage was not filed in the office of the Auditor of Stevens County, Washington, within ten days after its execution as required by Section 3780, Remington's Compiled Statutes of the State of Washington. [33]

6. In holding said chattel mortgage void as to the Receiver and creditors of Loon Lake Copper Company and further holding that the same is not a lien on the personal property owned by said Loon Lake Copper Company and in the hands of its Receiver.

7. In failing and refusing to hold said chattel mortgage to be a valid lien on the personal property of said Loon Lake Copper Company and that complainant was entitled to foreclose the same against the personal property of said Loon Lake Copper Company in the hands of J. Webster Hancox, its Receiver.

8. In failing to decree a foreclosure in favor of complainant on said personal property in the hands of said J. Webster Hancox, receiver of said Loon Lake Copper Company.

Dated this 27th day of October, 1924.

F. W. DEWART,
LAWRENCE E. BROWN,
Attorneys for Complainant.

Copy of the within assignments of error received this 27th day of October, 1924.

WILLIAM C. MEYER,
J. WEBSTER HANCOX,
Receiver, and for
S. R. STERN and
ALBERT KULZER,
Attorneys for Defendants.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 27, 1924. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [34]

In the District Court of the United States for the Eastern District of Washington, Northern Division, Sitting at Spokane, Washington.

IN EQUITY—No. E-4420.

MASSACHUSETTS TRUST COMPANY, Trustee,

Complainant,

vs.

LOON LAKE COPPER COMPANY and J. WEBSTER HANCOX as Receiver of the LOON LAKE COPPER COMPANY,

Defendants.

PETITION FOR ALLOWANCE OF APPEAL.

To the Honorable J. STANLEY WEBSTER, Judge of the Above-entitled Court:

Massachusetts Trust Company, a corporation, Trustee, complainant, in the above-entitled action,

feeling itself aggrieved by the decree of this Court made and entered herein on the 6th day of May, 1924, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herein, and prays that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings, and papers upon which said decree is based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, in the State of California. Further that this Court enter its order fixing the security to be required of your petitioner on said appeal.

Dated this 27th day of October, 1924.

F. W. DEWART,
L. H. BROWN,
Attorneys for Complainant,

Filed in the U. S. District Court, Eastern District of Washington. Oct. 27, 1924. Alan G. Paine, Clerk. Eva M. Hardin, Deputy.

Copy of foregoing petition for appeal received October 27th, 1924.

WILLIAM C. MEYER,
J. WEBSTER HANCOX,
Receiver, and for
S. R. STERN and
ALBERT KULZER,
Attorneys for Defendants. [35]

In the District Court of the United States for the Eastern District of Washington, Northern Division, Sitting at Spokane, Washington.

IN EQUITY—No. E-4220.

MASSACHUSETTS TRUST COMPANY, Trustee,

Complainant,

vs.

LOON LAKE COPPER COMPANY and J. WEBSTER HANCOX, as Receiver of the LOON LAKE COPPER COMPANY,

Defendants.

ORDER ALLOWING APPEAL.

The foregoing petition of Massachusetts Trust Company, Trustee, for an appeal from the decree entered herein on May 6th, 1924, to the United States Circuit Court of Appeal for the Ninth Circuit is hereby granted and allowed.

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars.

Dated this 27th day of October, 1924.

J. STANLEY WEBSTER,

District Judge.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 27, 1924. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [36]

In the District Court of the United States for the Eastern District of Washington, Northern Division, Sitting at Spokane, Washington.

IN EQUITY—No. E-4220.

MASSACHUSETTS TRUST COMPANY, Trustee,

Complainant,

vs.

LOON LAKE COPPER COMPANY and J. WEBSTER HANCOX, as Receiver of the LOON LAKE COPPER COMPANY,

Defendants.

APPEAL BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Massachusetts Trust Company, a corporation, organized and existing under and by virtue of the laws of the State of Massachusetts, of Boston, Massachusetts, as principal, and American Surety Company, of New York, a Corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to act as surety and to do business in the State of Washington, as Surety, are held and firmly bound unto Loon Lake Copper Company and J. Webster Hancox as Receiver of the Loon Lake Copper Company, defendants above named, in the full and just sum of Five Hundred ($500.00) Dollars, for the payment of which well and truly to be made we hereby bind our, and each of our executors and as-

signs, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Spokane, Washington, this 28th day of October, 1924.

WHEREAS the complainant above named has duly appealed from the final Decree herein entered May 6th, 1924, to the United States Circuit Court of Appeals for the Ninth Circuit holden at San Francisco, California and [37]

WHEREAS the above-entitled court fixed the amount of the bond to be given by said complainant on its appeal in the sum of Five Hundred ($500) Dollars.

NOW, THEREFORE, if the complainant shall prosecute its appeal to effect, and if it fail to make its plea good, shall answer all costs, then this obligation shall be null and void; otherwise to remain in full force and effect.

MASSACHUSETTS TRUST COMPANY,
By LAWRENCE H. BROWN,
Its Attorney.

AMERICAN SURETY COMPANY OF NEW YORK.
By W. L. BERRY,
Resident Vice-President.
Attest: J. B. WRIGHT,
Resident Assistant Secretary.

The foregoing bond and the surety therein is approved this 28th day of October, 1924.

J. STANLEY WEBSTER,
United States District Judge for the Eastern District of Washington, Northern Division.

O. K. as to form, signatures and amount.

W. C. MEYER,
J. WEBSTER HANCOX,
Receiver, and for
SAM'L R. STONE and
ALBERT KULZER,
Solicitors for Defendants.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 28, 1924. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [38]

In the District Court of the United States in and for the Eastern District of the State of Washington, Northern Division, Sitting at Spokane.

IN EQUITY—No. E-4220.

MASSACHUSETTS TRUST COMPANY, Trustee,

Plaintiff,

vs.

LOON LAKE COPPER COMPANY and J. WEBSTER HANCOX, as Receiver of LOON LAKE COPPER COMPANY,

Defendants.

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States to Loon Lake Copper Company and J. Webster Hancox, as Receiver of the Loon Lake Copper Company, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the 29th day of November, 1924, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the Eastern District of Washington in the matter wherein the Massachusetts Trust Company, Trustee, is appellant and Loon Lake Copper Company and J. Webster Hancox, as Receiver of Loon Lake Copper Company, are appellees, to show cause, if any there be, why the decree of the District Judge entered on the 6th day of May, 1924, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 30th day of October, 1924.

J. STANLEY WEBSTER,
District Judge.

[Seal] Attest: ALAN G. PAINE,
Clerk.

By ——————,
Deputy.

Filed in the U. S. Dist. Court, Eastern Dist. of Washington. Oct. 30, 1924, —— M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy.

Copy received Oct. 30, 1924.

WILLIAM C. MEYER.

Copy received.

J. WEBSTER HANCOX,
Receiver, and for
SAM'L R. STERN and
ALBERT KULZER,
Attorneys for Appellees. [39]

In the District Court of the United States in and for the Eastern District of the State of Washington, Northern Division, Sitting at Spokane.

MASSACHUSETTS TRUST COMPANY, Trustee,

Plaintiff and Appellant,

vs.

LOON LAKE COPPER COMPANY, and J. WEBSTER HANCOX, as Receiver of LOON LAKE COPPER COMPANY,

Defendants and Appellees.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court of the United States for the Eastern District of Washington, Northern Division:

YOU ARE HEREBY REQUESTED, in preparing your return to the citation on appeal in the above-entitled cause, to include therein the following (omit formal headings):

1. Bill of complaint (omitting the trust deed as set out therein).
2. Answer of Loon Lake Copper Company.

3. Answer of J. W. Hancox, Receiver.
4. Order striking from answer.
5. Decree appealed from.
6. The transcript of testimony as certified by the District Judge.
7. Assignments of error.
8. Petition on appeal.
9. Order allowing appeal.
10. Appeal bond.
11. Citation on appeal.
12. Praecipe for transcript of record, which comprises all the papers, records, or other proceedings than above mentioned which are necessary to be included by the Clerk of said Court in making up [40] his return to said citation as a part of such record.
13. Stipulation to transmit original transcript of testimony.
14. The trust deed (Exhibit 4) including the filing marks and clerk's certificate thereto (but omitting page 2–30 inclusive thereof).
15. Exhibits 1 and 3 attached to the Deposition of Arnold Whittaker.

F. W. DEWART,
L. H. BROWN,
Attorneys for Appellant.

Copy received October 31, 1924.

J. WEBSTER HANCOX,
Receiver, and for
SAM'L R. STERN and
ALBERT KULZER,
Attorneys for Receiver.

——————————,
WILLIAM C. MEYER,
Attorneys for Appellees.

Filed in the U. S. District Court, Eastern District of Washington, Oct. 30, 1924, —— M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [41]

In the District Court of the United States in and for the Eastern District of the State of Washington, Northern Division, Sitting at Spokane.

MASSACHUSETTS TRUST COMPANY, Trustee,

Plaintiff and Appellant,

vs.

LOON LAKE COPPER COMPANY and J. WEBSTER HANCOX, as Receiver of LOON LAKE COPPER COMPANY,

Defendants and Appellees.

STIPULATION RE TRANSMISSION OF TRANSCRIPT OF EVIDENCE AND EXHIBITS.

It is hereby stipulated by and between F. W. Dewart and Lawrence H. Brown, attorneys for

appellant, and J. W. Hancox, S. R. Stern, A. I. Kulzer and W. C. Meyer, attorneys for appellees, that the original of the transcript of evidence and exhibits certified by the District Judge on October 30, 1924, may be sent up to the Circuit Court of Appeals and that the clerk shall not be required to make a copy thereof.

Dated October 31, 1924.

F. W. DEWART,
L. H. BROWN,
Attorneys for Appellant.
WILLIAM C. MEYER,
J. WEBSTER HANCOX,
Receiver, and for
SAM'L R. STERN and
ALBERT KULZER,
Attorneys for Receiver.
————————,
Attorneys for Appellees.

Filed in the U. S. District Court, Eastern District of Washington. Oct. 30, 1924, —— M. Alan G. Paine, Clerk. Eva M. Hardin, Deputy. [42]

EXHIBIT No. 4.

No. 47238.

TRUST DEED.

THIS INDENTURE made as of the fifteenth day of November, A. D. 1918, by and between the LOON LAKE COPPER COMPANY, a corporation organized and existing under the laws of the State of Washington (hereinafter called the "Com-

pany"), of the one part, and MASSACHUSETTS TRUST COMPANY, a corporation organized and existing under the laws of the Commonwealth of Massachusetts (hereinafter called the "Trustee"), of the other part.

WHEREAS the Company has authorized the issue of ninety thousand dollars ($90,000) of its bonds and desires to secure the payment thereof by a mortgage of all the real estate and tangible personal property that it now owns or may hereafter acquire; and

WHEREAS these presents have been duly authorized at a meeting of the directors of the Company duly called and held, and approved at a meeting of the stockholders of the Company duly called and held, and all things necessary to authorize the execution and delivery of this instrument and to make said bonds, when duly issued and certified by the Trustee, binding, valid and legal obligations of the Company, and to render this instrument valid security therefor, have been duly performed; and

* * * * * * * * *

ARTICLE XII.

General Provisions.

All the covenants, stipulations, promises and agreements in this indenture contained by or on behalf of the Company shall bind and be binding upon its successors or assigns, whether so *so* expressed or not.

The word "Trustee" as used herein shall mean

the Trustee herein named, and *it* successor or successors in the trust hereby established, whether so expressed or not, and all powers, rights [43] privil*edg*es, immunities and duties hereinbefore granted to the Trustee shall likewise be applicable to each and every such successors.

The term "mortgaged property" and "mortgaged premises," as used herein, shall mean all the property now or hereafter mortgaged or pledged hereunder.

Although this indenture is dated for convenience and for the purpose of reference as of November 15, 1918, the actual date of the execution hereof is November 27, 1918.

IN WITNESS WHEREOF LOON LAKE COPPER COMPANY has caused its corporate seal to be hereto affixed and these presents to be signed, acknowledged and delivered in its name and behalf by its President and Secretary, thereunto duly authorized and MASSACHUSETTS TRUST COMPANY, in token of its acceptance of the trusts hereby created, has also executed these presents this twenty-seventh day of November, A. D. 1918.

LOON LAKE COPPER COMPANY,
By JAMES C. McCORMICK,
President.
By RALPH L. FLANDERS,
Secretary.

[Corporate Seal—Loon Lake Copper Company, Washington.]

Executed in duplicate. Signed, sealed, acknowledged and delivered in the presence of

MERRITT STEGMON.

MASSACHUSETTS TRUST COMPANY,

By EDGAR R. CHAMPLIN,

President.

ARNOLD WHITTAKER,

Secretary.

[Seal—Massachusetts Trust Company, Boston, Mass. Incorporated 1914.]

Signed, sealed, acknowledged and delivered in the presence of

MERRITT STEGMON.

Commonwealth of Massachusetts,
County of Suffolk,—ss.

James C. McCormick and Ralph L. Flanders, being duly sworn, each for himself on oath deposes and says: That he, the said James C. McCormick, is and at the time of the execution of the foregoing mortgage and deed of trust was the President of Loon Lake Copper Company, a corporation and the mortgagor therein named, and the same person who as such President executed said mortgage and deed of trust in behalf of said [44] corporation; that he, the said Ralph L. Flanders is at the time of the execution of said mortgage and deed of trust was Secretary of said corporation, the said mortgagor, and the same person who as such Secretary attested such mortgage and deed of trust in behalf of said corporation; and that the said mortgage and deed of trust is made in good faith and without design to

hinder, delay or defraud creditors or any creditor of said corporation.

[Corporate Seal—Loon Lake Copper Company, Washington.]

JAMES C. McCORMICK,
President.

RALPH L. FLANDERS,
Secretary.

Subscribed and sworn to before me this twenty-seventh day of November, 1918.

A. WHITTAKER,
Notary Public in and for the Commonwealth of Massachusetts, Residing in Winchester.

[Seal—Arnold Whittaker, Notary Public, Commonwealth of Massachusetts.]

My commission expires Jan., 1923.

Commonwealth of Massachusetts,
County of Suffolk,—ss.

On this twenty-seventh day of November, 1918, before me personally appeared James C. McCormick and Ralph L. Flanders, to me known to be the President and the Secretary, respectively, of Loon Lake Copper Company, one of the corporations that executed the within and foregoing instrument, and acknowledge the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute and attest said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year first above written.

A. WHITTAKER,

Notary Public in and for the Commonwealth of Massachusetts, Residing in Winchester, Mass.

[Seal—Arnold Whittaker, Notary Public, Commonwealth of Massachusetts.]

My commission expires Jan., 1923. [45]

Commonwealth of Massachusetts,

County of Suffolk,—ss.

On this twenty-ninth day of November, 1918, before me personally appeared Edgar R. Champlin and Arnold Whittaker, to me known to be the President and the Secretary, respectively, of Massachusetts Trust Company, one of the corporations that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute and attest said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

CHARLES E. CARLTON,

Notary Public in and for the Commonwealth of Massachusetts, Residing in Cambridge, Mass.

[Seal—Charles E. Carlton, Notary Public for the Commonwealth of Massachusetts, U. S. A.]

My commission expires Mch. 28, 1924.

Filed for record at the request of F. W. Dewart, Dec. 11, 1918, at 11:30 o'clock A. M., and recorded December 14, 1918.

EARLE T. GATES,
County Auditor.
By EARLE T. GATES.

Recorded in Book 34 of Records of Mortgages, at page 7 to 23.

State of Washington,
County of Stevens.

I, Dorothy Dexter, Auditor in and for the County of Stevens, State of Washington, do hereby certify that the within and foregoing is a full, true and correct copy of the record of an instrument of writing now recorded in my office on page 723, volume 34 of the record of Mortgages and on file under #12199 of the records of Chattel Mortgages.

In witness whereof I have hereunto set my hand and affixed my official seal, this 11 day of October, 1923. [46]

DOROTHY DEXTER,
Auditor Stevens County, Wash.
By ——————————,
Deputy.

47238

State of Washington,
County of Stevens,—ss.

This certifies that this instrument was filed for record in the Auditor's office of said County on the 11 day of Dec., 1918, at 11 o'clock and 30 min. A. M., at the request F. W. Dewart, and recorded in book

34 of records of Mtgs., Stevens County, Washington, on page 7, Dec. 14, 1923.

EARL T. GATES,
Aud. of Stevens Co., Wash.

Ex. No. 4. Ad. A. G. Paine, Clerk. [47]

EXHIBIT No. 1.

No. E—4220. Exhibit No. 1. (Seal) A. W. Murray, Notary Public.

6782
Telephones, Main 6783

Guy A. Ham.
Walter F. Frederick.
Harry H. Ham.
Ralph H. Willard.
William H. Taylor.

HAM, FREDERICK & WILLARD,
Attorneys at Law,
Sixth Floor,
24 Mild Street, Boston.

Please reply to

December 4, 1918.

Mr. Frederick W. Dewart,
Spokane, Wash.

Dear Sir:

I am enclosing, herewith, indenture duly execpted by officers of the Mass. Trust Company, as well as by officers of the Loon Lake Copper Company.

Will you please see to it that this is recorded with the proper officials in the State of Washington. As

the indenture covers both real estate and personal property, under the laws of Massachusetts it would be necessary to have this recorded in our Registry of Deeds to cover the real estate, and in the City Clerk's office to cover the personal property. I don't know, of course, the law in your state, but will you see that it is recorded in order to cover both classes of property?

Yours very truly,

GUY A. HAM.

GAH/k. [48]

EXHIBIT No. 3.

Exhibit No. 3. No. E—4220. (Seal) A. W Murray, Notary Public.

December 10, 1918.

Mr. Guy A. Ham, Attorney at Law,
24 Milk Street,
Boston, Massachusetts.

Dear Mr. Ham:

Your favor of December 4th duly received, enclosing indenture of the Loon Lake Copper Company to the Massachusetts Trust Company.

I have already sent this to the Auditor of Stevens County for recording, as a real estate mortgage and as a chattel mortgage, in accordance with your suggestion. This is necessary in our state, but both records are made by the County Auditor.

Yours truly,

(Signed) F. W. DEWART.

FWD:MS. [49]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. E—4220.

MASSACHUSETTS TRUST COMPANY,

Complainant,

vs.

LOON LAKE COPPER COMPANY and J. WEBSTER HANCOX, as Receiver of the LOON LAKE COPPER COMPANY,

Defendants.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Eastern District of Washington,—ss.

I, Alan G. Paine, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing pages numbered from 1 to 49, inclusive, constitute and are a complete, true and correct copy of the record, pleadings, orders and all proceedings had in said action, as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the order of appeal, lodged and filed in my office on the 27th day of October, 1924.

And I hereby annex and transmit the original Citation issued and filed in said suit.

I further certify that the cost of preparing and certifying said record amounts to the sum of $15.35, and that the same has been paid in full by the complainants and appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, *and* the City of Spokane in said Eastern District of Washington, in the Ninth Judicial District, this 3d day of November, A. D. 1924, and the Independence of the United States of America the one hundred and forty-ninth.

[Seal] ALAN G. PAINE,

Clerk. [50]

[Endorsed]: No. 4389. United States Circuit Court of Appeals for the Ninth Circuit. Massachusetts Trust Company, a Corporation, Appellant, vs. Loon Lake Copper Company, a Corporation, and J. Webster Hancox, as Receiver of the Loon Lake Copper Company, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

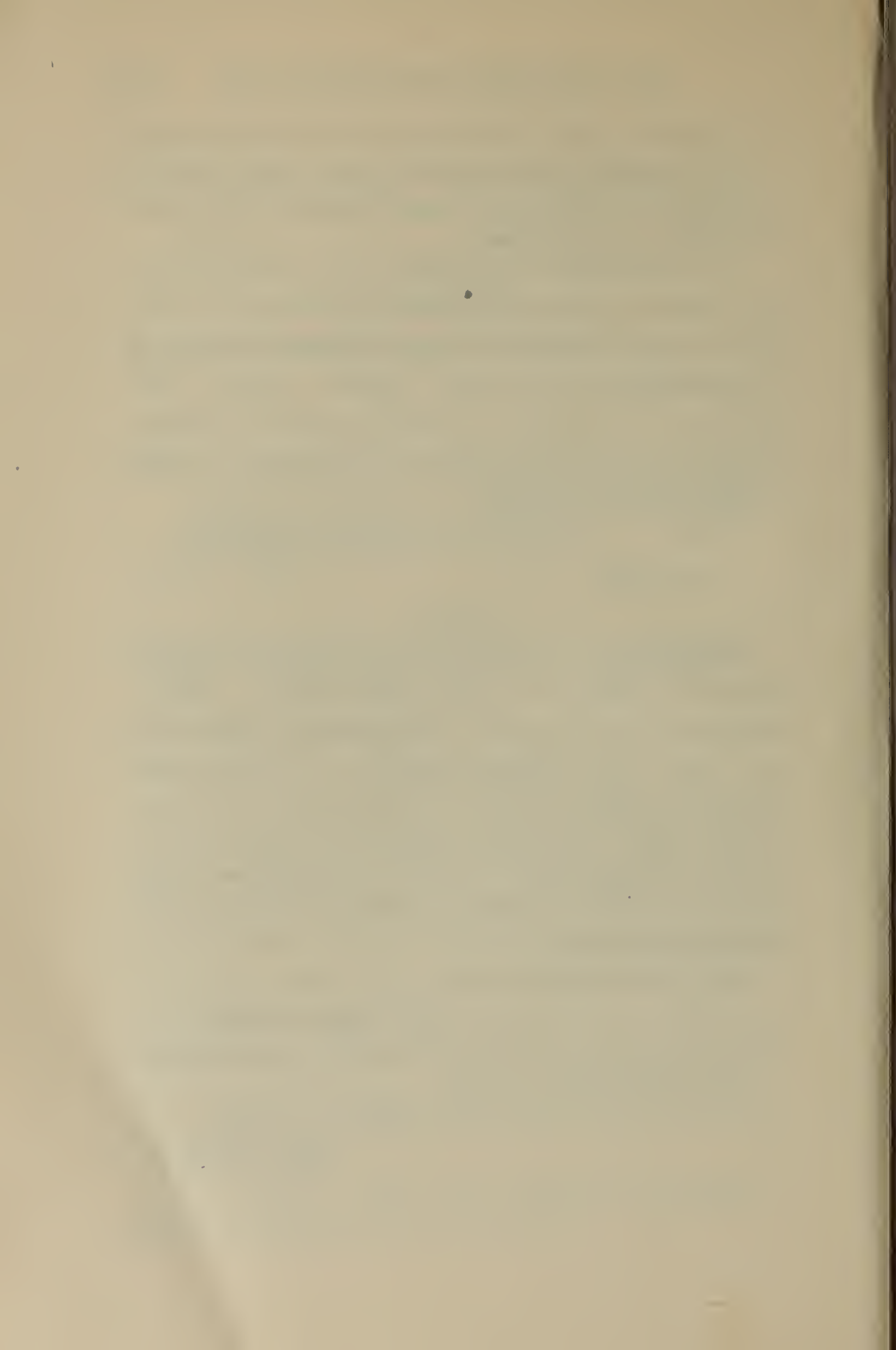
Filed November 6, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.



IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MASSACHUSETTS TRUST COMPANY, a Corporation,
Appellant,

vs.

LOON LAKE COPPER COMPANY, a Corporation, and J. WEBSTER HANCOX, as Receiver of the LOON LAKE COPPER COMPANY,
Appellees.

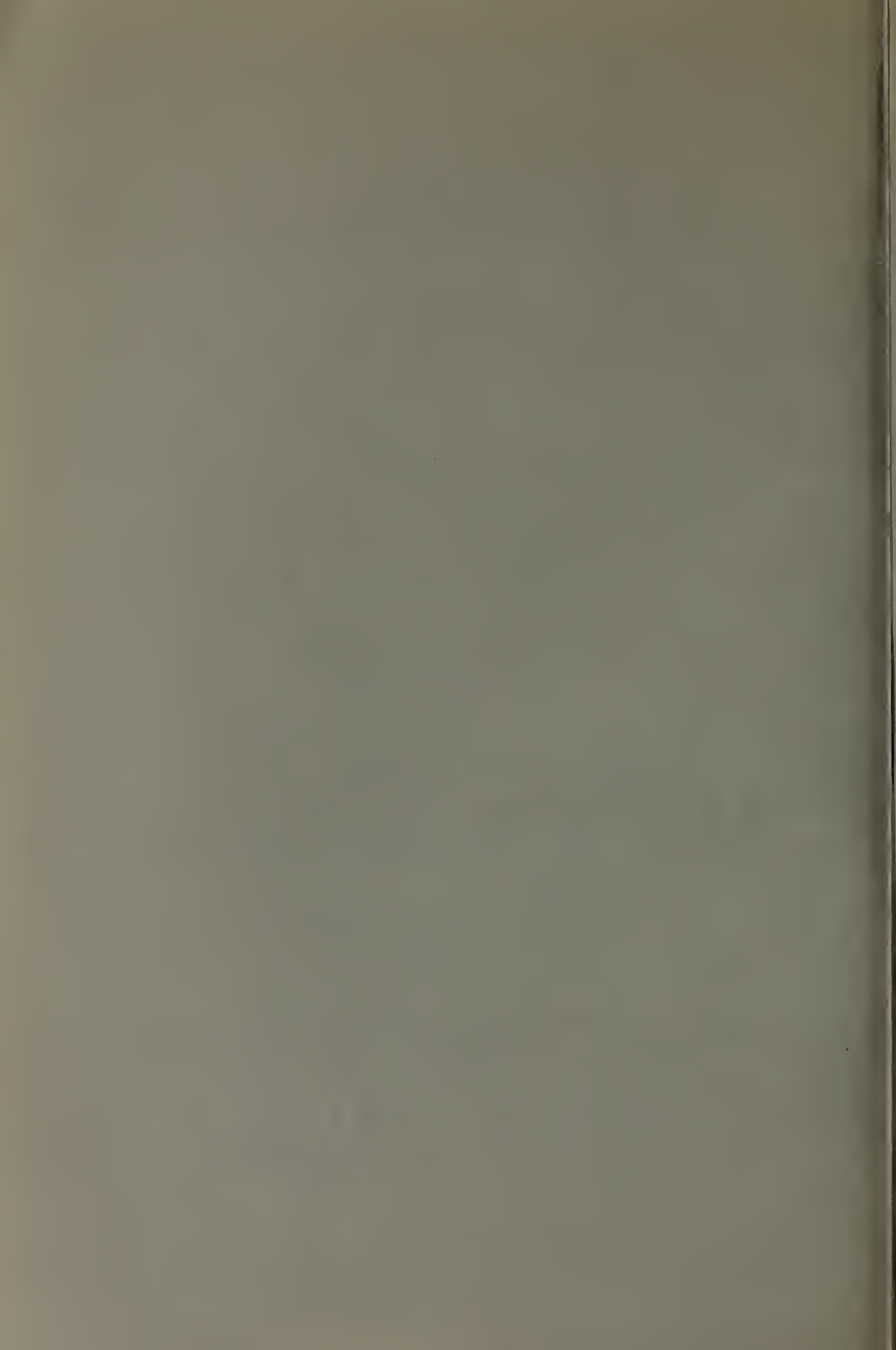
No. 4389

APPELLANT'S OPENING BRIEF

Upon Appeal from the United States District Court
for the Eastern District of Washington
Northern Division.

F. W. DEWART,
LAWRENCE H. BROWN,
Attorneys for Appellant.

FILED
Feb 2 - 1925



IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MASSACHUSETTS TRUST COMPANY, a Corporation,
Appellant,

vs.

LOON LAKE COPPER COMPANY, a Corporation, and J. WEBSTER HANCOX, as Receiver of the LOON LAKE COPPER COMPANY,
Appellees.

No. 4389

APPELLANT'S OPENING BRIEF

Upon Appeal from the United States District Court
for the Eastern District of Washington
Northern Division.

F. W. DEWART,
LAWRENCE H. BROWN,
Attorneys for Appellant.

STATEMENT OF THE CASE.

The facts are briefly as follows:

The Loon Lake Copper Company, a Washington corporation, issued under date of November 15, 1918, bonds in the aggregate sum of $90,000 and to secure such bonds, executed a deed of trust to the Massachusetts Trust Company, a Massachusetts corporation, as trustee, both as a real estate mortgage and as a chattel mortgage, covering all of the property of the company (including much valuable mining machinery and other personal property). Default following in the payment of both principal and interest of the bonds, this action was brought to foreclose the deed of trust or mortgage, in the District Court of the United States, for the Eastern District of Washington, Northern Division. The Massachusetts Trust Company, a Massachusetts corporation being complainant and the Loon Lake Copper Company, a Washington corporation, and J. Webster Hancox as Receiver of the Loon Lake Copper Company, defendants. (Tr. 2)

J. Webster Hancox, a resident of the state of Washington, was appointed receiver of the Loon Lake Copper Company in December, 1919, by the Superior Court of Spokane County, State of Washington, and is still acting as such receiver.

The deed of trust, (Tr. 51) was dated November

15, 1918, but the following clause was added to the instrument before the closing paragraph:

> "Although this indenture is dated for cenvenience and for the purpose of reference as of November 15, 1918, the actual date of the execution thereof is November 27, 1918." (Tr. 53)

Then follows the closing paragraph, as follows:

> "In witness whereof, Loon Lake Copper Company has caused its corporate seal to be hereto affixed and these presents to be signed, acknowledged and delivered in its name and behalf by its President and Secretary, thereunto duly authorized, and Massachusetts Trust Company in token of its acceptance of the trusts hereby created, has also executed these presents this twenty-seventh day of November, A. D., 1918." (Tr. 53)

The instrument was signed by the Loon Lake Copper Company by its President and Secretary and by the Massachusetts Trust Company by its President and Secretary. It was acknowledged by the said officers of the Loon Lake Copper Company on November 27th, 1918, and by the said officers of the Massachusetts Trust Company on November 29th, 1918. (Tr. 56)

The Massachusetts Trust Company, complainant and appellant, insists that the date of " execution" of the mortgage is December 4, 1918. That it received the mortgage and signed and acknowledged it on November 29, 1918, but it received it only tentatively,

until it could be examined and approved by its counsel. That it kept the mortgage in its control, after signing it, until it was approved by its counsel, and then on December 4, 1918, it, for the first time, accepted the mortgage, so notified the Loon Lake Copper Company and sent the mortgage on for record. These allegations are admitted by the Loon Lake Copper Company.

The instrument was duly filed as a real estate mortgage, and as a chattel mortgage, in the office of the Auditor of Stevens County, Washington, where the property was located, on December 11, 1918. (Tr. 57)

The Loon Lake Copper Company filed its answer in the case admitting all the allegations of the complaint. (Tr. 15)

J. Webster Hancox, Receiver, filed his answer and alleged among several defenses, that the mortgage was executed on November 27, 1918, and was not filed within ten days thereafter, and therefore, so far as the chattel mortgage was concerned, was void as to creditors. (Tr. 16)

The District Court rendered its decision and entered its decree for the foreclosure of the realty, but held that the mortgage was not filed as a chattel mortgage within ten days of its execution, so held

that the chattel mortgage could not be foreclosed. (Tr. 26)

Remington's Compiled Statutes of the State of Washington (Sec. 3780) provide as follows:

> "A mortgage of personal property is void as against all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon such property, and against all subsequent purchasers, pledgees, and mortgagees and encumbrancers for value and good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without design to hinder, delay, or defraud creditors, and unless it is acknowledged and filed within ten days from the time of the execution thereof in the office of the county auditor of the county in which the mortgaged property is situated as provided by law."

The only question to be determined in this case on appeal is: Was the filing of the mortgage on December 11, within ten days of the execution of the mortgage, or in other words, What was the date of acceptance of the deed of trust and mortgage by the Massachusetts Trust Company?

SPECIFICATION OF ERRORS

(1) The Court erred in making the following finding in its Decree (Tr. 27):

> "That said deed of trust was * * * accepted by the Massachusetts Trust Company on or about

> November 27th, 1918, and not later than November 29th, 1918, and that the said trust deed was executed by both parties on or about the 27th day of November, 1918, and not later than November 29th, 1918."

(2) The Court erred in making the following finding in its decree (Tr. 28):

> "The Court finds that the said trust deed does not constitute a lien on any of the personal property owned by the said Loon Lake Copper Company as against the Receiver and the creditors of the Loon Lake Copper Company, and that said trust deed is void as to them for the reason that said trust deed was not filed as a chattel mortgage within the time required by the laws of the State of Washington, to-wit, within ten days after the execution of said instrument, all as required by Section 3780 of Remington's Compiled Statutes of the State of Washington."

(3) The Court erred in its decree denying appellant's prayer for foreclosure of said trust deed against the personal property of the Loon Lake Copper Company in the hands of said J. Webster Hancox, as Receiver, and covered by said trust deed.

(4) The Court erred in holding that the chattel mortgage described in the bill of complaint was executed before the same was accepted by the Massachusetts Trust Company on December 4th, 1918, and in failing and refusing to hold that said chattel mortgage was executed on December 4th, 1918.

(5) The Court erred in failing and refusing to hold that said chattel mortgage was accepted by said

Massachusetts Trust Company on December 4th, 1918.

(6) The Court erred in failing and refusing to hold said chattel mortgage to be a valid lien on the personal property of said Loon Lake Copper Company and that complainant was entitled to foreclose the same against the personal property of said Loon Lake Copper Company in the hands of J. Webster Hancox, its Receiver.

ARGUMENT

Appellant submits:

I.

That the mortgage was not executed until it was accepted by the Massachusetts Trust Company, the grantee, on December 4, 1918.

II.

The date of the instrument or of its acknowledgment is only presumptive evidence that it was executed on that day, and the true date or time of execution may be shown by parol evidence in contradiction of the date as it appears by the deed or by record.

III.

The evidence is positive and uncontradicted that

the mortgage was accepted by the Massachusetts Trust Company on December 4, 1918, and not before.

IV.

That the chattel mortgage was duly filed within ten days of its execution, is legal, and may be foreclosed by appellant.

I.

THAT THE MORTGAGE WAS NOT "EXECUTED" UNTIL IT WAS ACCEPTED BY THE MASSACHUSETTS TRUST COMPANY, THE GRANTEE, ON DECEMBER 4, 1918.

The Supreme Court of the State of Washington in a case construing this very statute regarding the execution of a chattel mortgage said:

> "Was the filing of this mortgage on December 21 within the time provided for? We think it was. The date of the mortgage, December 9, did not alone determine its 'execution' as that word is understood and interpreted in statutes of a like character. The execution of a chattel mortgage means and includes the doing of those formal acts necessary to give the instrument validity as between the parties. There certainly could be no validity to a mortgage without a delivery and acceptance. One cannot be made a mortgagee unless there is some act on his part which can and does express his relation to the instrument. There must be a 'meeting of the minds' in this sort of relation as in any other contract. Without these formalities there is no

mortgage. *Jones, Chattel Mortgages*, p. 104. The word 'execute' when applied to a written instrument, unless the context indicates that it was used in a narrower sense, imports the delivery of such instrument. *LeMesnager vs. Hamilton*, 101 Cal. 532; 35 Pac. 1054; 40 Am. St. Rep. 81. In *Brown vs. Westerfield*, 47 Neb. 399; 66 N. W. 439; 53 Am. St. Rep. 532, 'execution' was held to include all acts essential to the completion of the instrument. A very similar case to the one before us will be found in *Hornbrook vs. Hetzel*, 27 Ind. App. 79, 60 N. E. 965; the mortgage being dated June 25th, but not delivered nor filed until Aug. 4th. The court says 'delivery was necessary to its execution. The statute requires that a chattel mortgage must be filed for record in the office of the recorder of the proper county within 10 days after its execution. As there was no execution until its delivery, the mortgage was recorded in time.' For other cases in point see: *Solt vs. Anderson* 67 Nb. 103, 93 N. W. 205; *Arrington vs. Arrington* 122 Ala. 510, 26 South, 152; *Shaughnessey vs. Lewis*, 130 Mass. 355; *Wells vs. Lamb*, 19 Neb. 355, 27 N. W. 229."

Fenby vs. Hunt, 53 Wash. 127 (P. 130).

The authorities are numerous and we believe unanimous to the same effect.

"Acceptance by grantee is an essential part of delivery."

3 *Washburn Real Property* 4th Ed. p. 292.

"Delivery of a deed includes a surrender and an acceptance, both of which are necessary to its completion. This must be the result of contract, the meeting of two minds, the accord of two

wills. The grantor must be willing and agree to deliver, and the grantee must be willing and consent to receive, and this accord of wills must be evinced in some way to show the unequivocal intention of both parties that the instrument shall take effect according to its purport and tenor."

> *Best vs. Brown* (N. Y.) 25 Hun. 223-4 (citing *Fisher vs. Hall*, 41 N. Y. 416; *Brackett vs. Barney*, 28 N. Y. 333.)

"Delivery of a deed includes the surrender and acceptance. Both are necessary to the completion of the delivery. The grantor must be willing and agree to deliver, and the grantee must be willing and consent to receive, and this meeting of minds must be evidenced in some way to show the unequivocal intention of both parties that the instrument shall take effect according to its purport and tenor."

> *Rousseau vs. Bleau* 14 N. Y., Supp. 712, 716; 60 Hun. 259.

"There must be not only a parting with control of the deed by the grantor with the present intention that it shall operate as a conveyance of the land, but there must likewise be an acceptance, either by the grantee, or by some one for him—*Devlin on Deeds* Par. 278 et seq."

> *Smith vs. Moore* 149 N. C. 185 (62 S. E. 892).

"To constitute a good delivery, a deed must not only pass from the actual and constructive control of the grantor, but the grantee must accept the deed."

> *McCune vs. Goodwillie* 204 Mo. 306 (102 S. W. 997).

"To constitute the delivery of a deed, there must not only be a delivery by the grantor, but an acceptance by the grantee."

Bank of Healdsburg vs. Bailhace 65 Cal. 327 (4 Pac. 106).

"Acceptance by a grantee is an essential part of the delivery of a deed."

Powell vs. Banks 146 Mo. 620 (48 S. W. 664).

"The term 'delivered' when used in reference to a conveyance, implies acceptance. There may be delivery in escrow, and there may be a transfer of manual possession for examination or other purposes, but without acceptance there is merely a tender. Delivery implies both tender and acceptance."

Tate vs. Clement 176 Pa. 550 (35 Atl. 214).

Wigmore in his book on Evidence (1905 Edition) in considering Parol evidence, rules, Delivery and Intent, says (Volume IV p. 3374):

"The act must be final in its utterance. it does not come into existence as an act until the whole has been uttered. As almost all important transactions are preceded by tentative and preparatory negotiations and drafts, the problem is to ascertain whether and when the utterance was final; because until there has been some finality of utterance there is no act. The necessity for the delivery of a document, and the nature of a delivery, are here the most usual questions in practice."

And on page 3382:

"A legal act does not come into existence as such until its utterance is final and complete. All transactions require an appreciable lapse of time for their fulfillment; most important transactions in writing are consummated only after successive inchoate acts of preparation, drafting and revision. Moreover, the written terms may be prepared with a precision which leaves nothing to alter (as it turns out), and still may be for a while retained for reflection or submitted for suggestion, without as yet any final adoption. Until some finality of utterance takes place, there is no legal act. Whenever, therefore, certain conduct or writing is put forward against a party as his purporting act, no principle prevents him from showing that there never was a consummation of the act."

And on page 3384:

"There is, therefore, no invariable mark of finality for a deed—whether it be the act of writing, or of sealing, or of manually delivering or of publicly recording—subject to certain usual presumptions of conduct, the circumstances of each case must control."

And on page 3387:

"It also follows that the date of a document's execution may be established by proving the actual time of the conduct, regardless of any statement of date contained in the writing; because the time of finality of the utterance, as a legal act, is something essentially independent of and exterior to the writing itself."

And on page 3403:

"The third element of every act, its finality of utterance—usually marked by the delivery of

the instrument—is equally governed, in respect to the competition between intent and expression, by the principle of reasonable consequences—whether the act has been completed, or delivered, is not to be determined by the actual intention of the actor, but by the inquiry whether his conduct produced as a reasonable consequence the appearance of finality to the other person. Where the other person is an immediate party to the transaction, and the mutual understanding is that the document has not yet been finally issued and delivered, there is no difficulty; in such cases the first party is of course not to be charged with the document."

II.

THAT THE DATE OF THE INSTRUMENT OR THE DATE OF ITS ACKNOWLEDGMENT IS ONLY PRESUMPTIVE EVIDENCE THAT IT WAS EXECUTED ON THAT DAY, AND THE TRUE DATE OR TIME OF EXECUTION MAY BE SHOWN BY PAROL EVIDENCE IN CONTRADICTION OF THE DATE AS IT APPEARS BY THE DEED OR BY RECORD.

Wigmore says, in his work cited above, on Evidence, on page 3387:

> "It also follows that the *date* of a document's execution may be established by proving the actual time of the conduct regardless of any statement of date contained in the writing; because the time of finality of the utterance, as a legal act, is something essentially independent of and exterior to the writing itself."

We believe that there is no authority questioning this, and that there can be no clearer statement of the legal doctrine.

Jones on Mortgages (7th Edition) Vol. 1, on page 107, says:

> "A mortgage is not invalid although it is not dated, or has a false date, or an impossible one, as, for instance, February 30th, provided the real day of its date or delivery can be proved. The date, being no part of the substance of the deed, may be contradicted. The true date or time of execution may be shown by parol evidence in contradiction of the date as it appears by the deed or by record."

And says:

> "If material at all, the date is only necessary to fix the time of payemnt of the debt secured."

And again in the same volume, on page 775, says:

> "The fact of the acknowledgment of the deed at a certain date is not by itself evidence that it was delivered at that time, or was ever delivered, though this has been said to be presumptive evidence."

In Williston on Contracts (1920) Volume I, p. 420-421, it is said:

> "The final requisite for the validity of a deed is delivery. Until delivery it is ineffectual though signed, sealed and assented to by the parties as an expression of the bargain between

them; and when once delivered it is binding though redelivered for safe keeping. It matters not when the instrument is dated; it becomes effectual when delivered, though the execution is presumed in the absence of evidence to the contrary to have taken place on the day on which the deed is dated."

"The date of a deed or mortgage, is at most only presumptive evidence of the time of delivery, and this presumption may always be rebutted by proof, as in the case at bar."

Banning vs. Edes, 6 Minn. 270.

"Professor Washburn in his work on real property says:—'But though a presumption would arise that the deed was delivered and took effect on the day of the date, if there was nothing offered in evidence to control this, it is always competent to show that the date inserted was not the true date of its delivery.' "

McMichael vs. Carlyle, 53 Wisc. 504.

"The rules of law, as applied in construing the dates of other instruments, even the most solemn, such as deeds and writings under seal, certainly are, that the written date is not conclusive evidence of the time of the transaction. This, when controverted and material, may be proven by extraneous evidence notwithstanding a written date."

Lee vs. Mass. Fire and M. Ins. Co. 6 Mass. 207.

"The real date of the deed is the time of its delivery."

Kent C. J., in Jackson vs. Schoonimeker 2 Johns. 234.

"It has been so long and so well known that the date of an instrument is only presumptive evidence that it was executed on that day, and that testimony as to when it was actually signed and delivered, is admissible, that we will only cite *Abrams vs. Pomeroy*, 13 Ill. 134, cited by defendant."

Davidson vs. Poague 263 Fed. 876 p. 878 C. C. A. 7th Circ.

And this has been expressly decided by the Supreme Court of the United States, as the correct law, and so far as we know there is no authority to the contrary.

"The condition of the bond recites: 'Whereas the said Oliver S. Beers is deputy postmaster at Mobile aforesaid,' etc.

"The first inquiry is, to what date is this recital to be referred? The district judge who presided at the trial, ruled that it referred to the office held by Beers when the bond was signed. The delivery of a deed is presumed to have been made on the day of its date. But this presumption may be removed by evidence that it was delivered on some subsequent day; and when a delivery on some subsequent day is shown, the deed speaks on that subsequent day, and not on the day of its date.

"In Clayton's case 5 Coke 1, a lease, bearing date on the 26th day of May, to hold for three years 'from henceforth,' was delivered on the 20th of June. It was resolved that 'from henceforth' should be accounted from the day of delivery of indentures, and not from the day of their date: for the words of an indenture are

not of any effect until delivery—*traditio loqui facit chartam.*

"So in *Ozkey vs. Hicks,* Cro. Jac., 263, by a charter-party, under seal, bearing date on the 8th of September, it was agreed that the defendant should pay for a moiety of the corn which then was, or afterwards should be laden on board a certain vessel. The defendant pleaded that the deed was not delivered until the 28th of October, and that on and after that day there was no corn on board; and on demurrer, it was held a good plea, because the word *then* was to be referred to the time of the delivery of the deed, and not to its date.

"And the modern case of *Steele vs. March,* 4 B and C., 272, is to the same point. A lease purported on its face to have been made on the 25th of March, 1783, habendum from the 25th of March *now* last past. It was proved that the delivery was made after the day of the date, and the Court of King's Bench held that the word *now* referred to the time of delivery, and not to the date of the indenture."

U. S. vs. LeBaron 19 Howard 73 p. 75.

"The next proposition of the District, that it was not competent for plaintiff below to show by parol that the contract was finally executed and delivered by the District at a date subsequent to the date of the contract, is without merit. The contract did not provide that the work was to be completed within one hundred and thirty-six days from its date, but 'after the date of the execution of the contract.' It is well settled that, in such circumstances, it may be averred and shown that a deed, bond or other instrument was in fact made, executed and delivered at a date subsequent to that stated on its face.

> "In *United States vs. LeBaron*, 19 How. 73., it was ruled that a deed speaks from the time of its delivery, not from its date: and Mr. Justice Curtis, who gave the opinion, cited Clayton's case, 5 Coke, 1: *Ozkey vs. Hicks*, Cro. Jac. 263, and *Steele vs. Mart*, 4B. and C. 272. To which the Court of Appeals added *Hall vs. Cazenove* 4 East, 477. These cases fully sustain the doctrine that parties, situated as here, are not precluded from proving by parol evidence when a deed or contract is actually made and executed from which time it takes effect."
>
> *District of Columbia vs. Camden Iron Works*, 181 U. S. 453, p. 461.

In *Hathaway & Co. vs. U. S,,* 249 U. S. 460, on p. 464, the Court referring to *D. C. vs. Camden*, supra, says:

> "What was there decided is merely that under such circumstances (there the contract provided that the work should be completed within a certain number of days from the date of the execution of the contract), it may be shown that a deed, bond or other instrument was in fact made, executed and delivered at a date subsequent to that stated on its face."

We have cited many authorities on this point because the United States District Judge in the court below, in deciding this case, stated that he thought the following statement in the mortgage:

> " 'Massachusetts Trust Company, in token of its acceptance of the trusts hereby created has also executed these presents on the day and year first above written' was signed by the officers of

> the Massachusetts Trust Company, and was binding on that Company."

And in the decree it recites:

> "Said Deed of Trust was * * * accepted by the Massachusetts Trust Company on or about November 27th, 1918, and not later than November 29th, 1918, and that the said Trust Deed was executed by both parties on or about the 27th day of November, 1918, and not later than November 29th, 1918."

(This part of the decree was written in by direction of the judge himself.)

We submit the statement in the mortgage may be binding to the extent that the trust was accepted, but it certainly is not binding that the date therein given, as the date of the Mortgage November 15th, 1918, or the inserted clause: "Although this indenture is dated for convenience and for the purpose of reference as of November 15, 1918, the actual date of the execution hereof is November 27, 1918." is the date of such acceptance.

The statement in the decree "27th day of November, 1918, and not later than November 29th, 1918," is of course inconsistent with his Honor's ruling, for if the clause quoted above is binding as he thought it was, then November 27th (and not November 15th) was the date of execution. The fact of the acknowledgment by the officers of the Massachusetts Trust Company being November 29th would not

change the fact, if the date given as the signing of the instrument becomes beyond any question, the date of the delivery and acceptance of the instrument.

But we have shown by the best legal authorities in this country, both of text book writers and of the courts, including the Supreme Court of the United States, this is *not* the law. We submit there are *no* authorities to be found contrary to those we have cited and quoted.

III.

THE EVIDENCE IS POSITIVE AND UNCONTRADICTED THAT THE MORTGAGE WAS ACCEPTED BY THE MASSACHUSETTS TRUST COMPANY ON DECEMBER 4th, 1918, AND NOT BEFORE.

The only "evidence" that the execution of the instrument was "November 27th or not later than November 29th" is the presumption arising from the date of the instrument. But as Williston says (1 Williston on Contracts, 210):

> "It matters not when the instrument is dated; it becomes effectual when delivered, though the execution is presumed *in the absence of evidence to the contrary* to have taken place on the day on which the deed is dated."

Or, in other words, the presumption vanishes as soon as there is *evidence* of what the actual date was.

In this case, all the parties to the transaction agree that the mortgage was accepted by the Massachusetts Trust Company on December 4, 1918.

Arnold Whittaker of Boston, Massachusetts, was Secretary of the Massachusetts Trust Company during 1918, and as such signed the mortgage in question. He is now Treasurer and Vice-President of the Company. He testified by deposition. He says (Tr. 31), in answer to an interrogatory:

> "It is the practice of the Massachusetts Trust Co. not to accept any trust or execute any legal document under which it is obligated in any way until such document has been examined and approved by its counsel. This deed of trust was therefore submitted to Mr. Guy A. Ham, an attorney at law, 24 Milk Street, Boston, Massachusetts, for his examination and approval, before it was finally accepted and delivered by the Massachusetts Trust Company. The document was handed to Mr. Ham about November 29, 1918, and on December 4, 1918, it was approved by Mr. Ham and on that date the formal delivery was actually accepted by the Massachusetts Trust Company and Mr. Ham was instructed to forward the instrument to Frederick W. Dewart, Esq., 801-802 Old National Bank Building, Spokane, Washington, to be recorded. This instrument, that is, the deed of trust, was actually acknowledged on November 29, 1918, but as I just stated, it was not actually accepted and delivered until December 4, 1918, on which date,

it was formally approved by our counsel and the delivery was made by him in accordance with our instructions."

And in answer to cross interrogatories he further states. (Tr. 32):

"That provision (in the deed of trust) is a statement of the facts relative to the actual date of signature, and was inserted in the deed of trust to explain the apparent discrepancy in dates. The reason the instrument was not delivered on either of said dates but was actually delivered on December 4, 1918, is as I have previously stated because the instrument was submitted to Guy A. Ham, Counsel for the Massachusetts Trust Company, for his approval and after he had approved it, the delivery of the deed of trust was actually accepted on December 4, 1918. This deed of trust was in the possession of counsel for the Massachusetts Trust Company between November 29, 1918, and December 4, 1918, for purpose of examination. After the Massachusetts Trust Company's officials acknowledged the deed of trust, which acknowledgment was on November 29, 1918, it was submitted to its counsel, Guy A. Ham, Esq., for examination and approval before it was definitely accepted by the Massachusetts Trust Company. After the instrument was approved by the counsel for the Massachusetts Trust Company, and accepted by it on December 4, 1918, *notice of the Massachusetts Trust Company's acceptance being given on that date to the Loon Lake Copper Company*, Mr. Ham forwarded it by mail to Frederick W. Dewart, Esq., 801 Old National Bank Building, Spokane, Washington, to be recorded." (Tr. 33).

> "On December 4, 1918, our counsel, Guy A. Ham, Esq., delivered the deed of trust by sending it by mail to Frederick W. Dewart, Esq., 801-802 Old National Bank Building, Spokane, Washington, who at that time was counsel and and an officer of the Loon Lake Copper Company and requested Mr. Dewart to record the instrument." (Tr. 33).

This is Mr. Whittaker's testimony, and of course he is the person who knows better than anyone else when the mortgage was accepted by the Trust Company. He was at that time the Secretary of the Trust Company, signed and acknowledged the mortgage as such, and would naturally be the official who would handle such a transaction. His testimony is not disputed in any way by any person. And it agrees with all the facts of the record.

The Loon Lake Copper Company filed its answer admitting the allegation of the complaint, that the mortgage was executed on December 4, 1918. (Tr. 14).

Mr. Dewart, who was an officer of the Loon Lake Copper Company, testified, (Tr. 34) that he received on December 9th the letter dated December 4, 1918, from Mr. Ham, copy of which is in the record attached to Mr. Whittaker's deposition and enclosing the deed of trust, and that he sent this forward the same day to Colville for recording in Stevens County, where the property is situated.

Mr. Dewart further testified that the Loon Lake Copper Company received *at its Boston office* a letter from the Massachusetts Trust Company stating that it had on December 4, 1918 accepted the mortgage, and that he had seen the letter there. (Tr. 35). Mr. Dewart's testimony on cross examination being as follows:

> "At that time I was an officer of the Loon Lake Copper Co. All this money was expended after the bond issue was made. All these purchases were made and delivered to the Loon Lake Copper Co. within a year or a little less. I have seen the other officers of the Loon Lake Copper Co. since the execution of this bond and since this suit was started, and they do not have, to my knowledge, any other record than that introduced here, except the trust deed delivered to the Massachusetts Trust Company, and except *the letter of acceptance* of December 4. That *letter of acceptance* from the Massachusetts Trust Company, dated December 4, is in Boston. *Such a lettr was sent to the officials in Boston.*
>
> "This was an issue of bonds gotten out by the Loon Lake Copper Co., which asked the Massachusetts Trust Company to act as trustee of the bond issue." (Tr. 35).

This testimony is positive, and covers the two parties to the transaction who agree as to what took place. The instrument was signed and acknowledged by the Loon Lake Copper Company on November 27th, it was signed and acknowledged by the Massa-

chusetts Trust Company on November 29, 1918, and turned over to its attorney for examination before the Company would accept it. The instrument was held by the Massachusetts Trust Company after signing it, until its attorney had passed upon it. Then the acceptance took place on December 4, 1918, the Loon Lake Copper Company was notified and the instrument sent to the attorney at Spokane for record. There is no possible break in the facts or record. They are clear, plain, and there is no suggestion of contradiction. There is no word of evidence to the contrary, and these are the facts in reality and in the record in this case.

As was said by Wigmore, p. 3403:

> "Where the other person is an immediate party to the transaction, and the mutual understanding is that the document has not yet been finally issued and delivered, there is no difficulty; in such cases, *the first party is of course not to be charged with the document.*" (Italics ours).

So the Massachusetts Trust Company and the Loon Lake Copper Company agreeing that the mortgage was not finally issued and delivered until December 4, 1918, *of course*, the party is not to be charged with the instrument before that date.

IV.

THAT THE CHATTEL MORTGAGE WAS DULY FILED WITHIN TEN DAYS OF ITS EXECUTION, IS LEGAL, AND MAY BE FORECLOSED BY APPELLANT:

The statute provides that the chattel mortgage must be filed within ten days of its execution. The Supreme Court of the State of Washington, in construing this statute in *Fenby vs. Hunt*, 53 Wash. 127, held that "execution" included the delivery of the mortgage and its acceptance by the grantee, and this is the general law.

The authorities are numerous and unanimous that the date given in a mortgage is only presumptive evidence of its delivery and acceptance, and the true date of delivery and acceptance may be shown by parol.

And the record in this case shows positively and without question that the mortgage was not accepted by the Massachusetts Trust Company until December 4, 1918.

We submit that the chattel mortgage was duly and properly filed within the time prescribed by law, and

MASSACHUSETTS TRUST VS. LOON LAKE COPPER

APPELLANT'S SUPPLEMENTAL AUTHORITIES

4398

The State Court's construction of the statute involved in this case controls this court.

Cutler vs. Huston 158 U.S. 432,39L.Ed.1040

-:-:-:-:-

Appellees have, in their brief, raised the following questions which however are not involved in this appeal.

A The question of after acquired property.

B The question of receiver's fees and expenses.

C That the bonds were sold at a discount.

The District Judge in his decree (Tr 28) found against the validity of the chattel mortgage on one ground only (that of its time of filing) and all else is, therefore, beside the question. Such questions are not before this court for review and cannot be first raised here.

Respectfully submitted

Frederick W. Dewart
Lawrence H. Brown

Counsel for Appellant

III.

IV.

THAT THE CHATTEL MORTGAGE WAS DULY [illegible] MAY BE FORE-CLOSED BY APPELLANT.

[illegible] within ten days of its execution. [illegible]

[illegible] Court of the State of Washington, in construing this statute in [illegible] Wash. [illegible] held that "execution" included the delivery of [illegible]

[illegible] the date shown by a mortgage is only presumptive evidence of the delivery and acceptance, and the true date of delivery and acceptance may be shown by [illegible]

[illegible]

We submit that the chattel mortgage was duly and properly filed within the time prescribed by law, and

is a valid lien, that the decree of the District Court should be reversed as to the chattel mortgage and the cause remanded for correction of the decree.

Respectfully submitted,

F. W. DEWART,

LAWRENCE H. BROWN,

Counsel for Appellant.

UNITED STATES 7
CIRCUIT COURT of APPEALS
FOR THE NINTH CIRCUIT

MASSACHUSETTS TRUST COMPANY, a corporation,
Appellant,

vs.

LOON LAKE COPPER COMPANY, a corporation, and J. WEBSTER HANCOX, as Receiver of the LOON LAKE COPPER COMPANY,
Appellees.

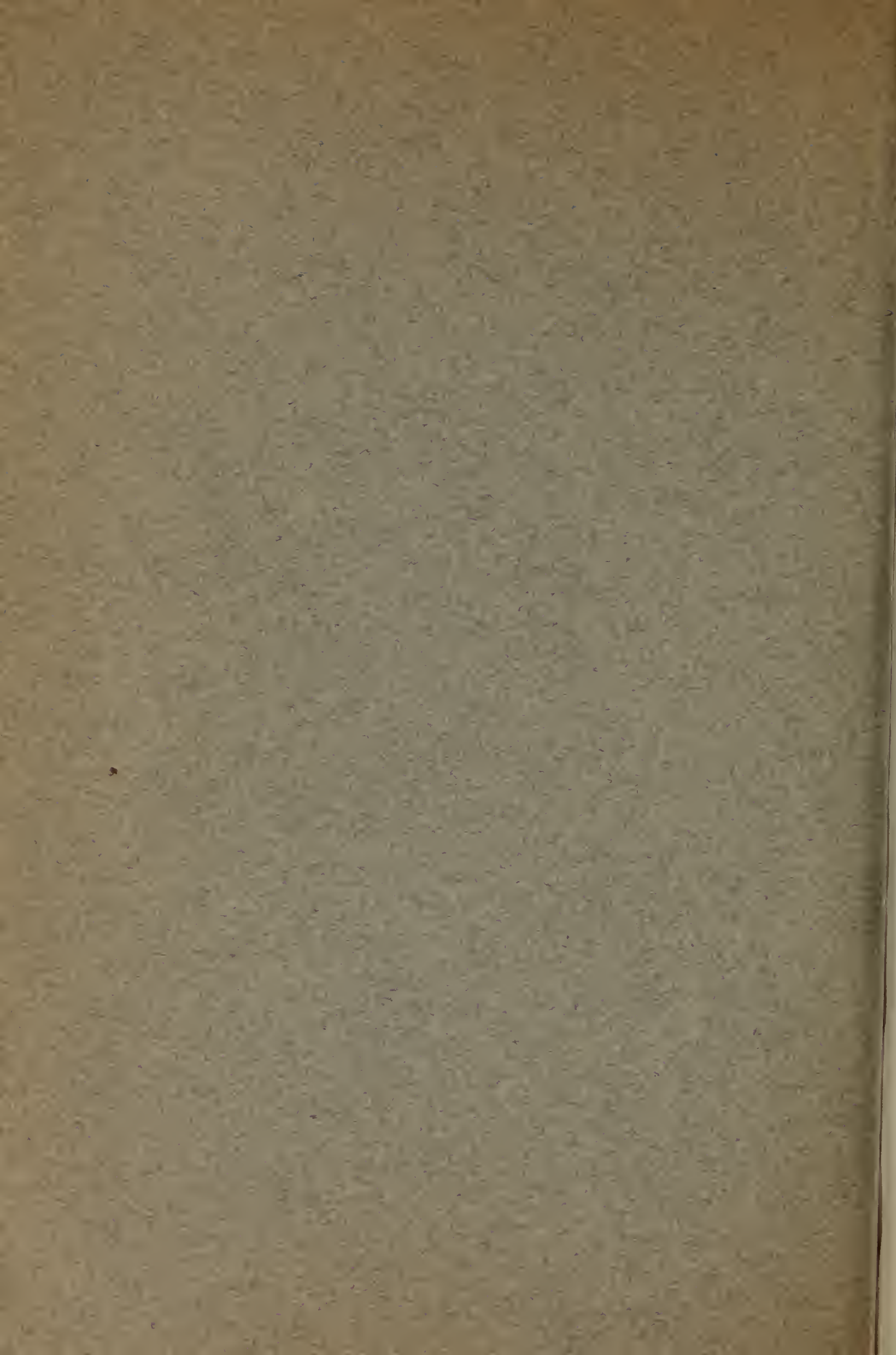
No. 4389

APPELLEES' BRIEF.

Upon Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

J. WEBSTER HANCOX,
For Himself as Receiver,

SAMUEL R. STERN, *and*
ALBERT I. KULZER,
Attorneys for Receiver.



UNITED STATES
CIRCUIT COURT of APPEALS
FOR THE NINTH CIRCUIT

MASSACHUSETTS TRUST COMPANY, a corporation, *Appellant,* *vs.* LOON LAKE COPPER COMPANY, a corporation, and J. WEBSTER HANCOX, as Receiver of the LOON LAKE COPPER COMPANY, *Appellees.*	No. 4389

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SAMUEL R. STERN, *and*
ALBERT I. KULZER,
Attorneys for Receiver.

STATEMENT OF THE CASE.

The Massachusetts Trust Company, Trustee, filed its Bill of Foreclosure in the District Court of the United States, in the Eastern District of Washington, Northern Division, on the 18th day of October, 1923, seeking to foreclose a trust deed given by the Loon Lake Copper Company, a Washington corporation, on property situated in Stevens County, Washington. This trust deed was for the purpose of securing a bond issue in the sum of $90,000.00, issued by the Loon Lake Copper Company under date of November 15th, 1918. The ground for seeking foreclosure was that default had been made in the payment of both the principal and interest on said bonds. The defendants named were the Loon Lake Copper Company, a Washington corporation, and J. Webster Hancox, the Receiver of the Loon Lake Copper Company.

The Loon Lake Copper Company appeared in said action, and admitted the allegations of plaintiff's complaint. The Receiver appeared and filed his answer, denying certain allegations of the complaint, and setting up separate and affirmative defenses.

The Receiver admitted said instrument was a lien against the real property owned by the defendant, Loon Lake Copper Company, but denied that it was a valid lien against the personal property. He bases his reasons therefor, first, that the trust deed was signed and executed as a chattel mortgage on the 27th day of November, 1918, but was not filed for

record within the time required by law in the State of Washington, to-wit: Within ten days after the execution thereof; and, second, that the said trust deed, while executed as a chattel mortgage did not constitute a valid lien against the personal property acquired after the time of the execution of the mortgage. He also alleged that, while the bonds were issued in the sum of $90,000.00, the actual amount of money received by the said Loon Lake Copper Company was the sum of $60,000.00, and that said bonds were usurious contracts under the statutes of the State of Washington. (Rem. Comp. Statutes, Secs. 7299-7305.) He also alleged that all of the property owned by the Loon Lake Copper Company was subjected to the cost of the receivership in caring for and preserving the same.

The court, after hearing the testimony and argument of counsel, decreed a foreclosure in favor of plaintiff against the real property covered by the trust deed, but denied foreclosure as against the personal property. The District Judge decided the case on the ground that the mortgage was not filed as a chattel mortgage within ten days after its execution, as required by Remington's Compiled Statutes of the State of Washington, Section 3780:

> "A mortgage of personal property is void as against all creditors of the mortgagor, *BOTH EXISTING AND SUBSEQUENT WHETHER* OR NOT THEY HAVE OR CLAIM A LIEN *UPON SUCH PROPERTY,* and against all subsequent purchasers, pledgees, and mortgagees and

> encumbrancers for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and unless it is acknowledged and filed within ten days from the time of the execution thereof in the office of the county auditor of the county in which the mortgaged property is situated as provided by law."

EVIDENCE.

The evidence in this case is brief. It shows that the Loon Lake Copper Company made a bond issue among its stockholders in the sum of $90,000.00. It further shows, and the court so found, that for the $60,000.00 paid, evidence of indebtedness of $90,000.00 was to be issued by the company. (Tr. 27.) None of these bonds were introduced in evidence, nor was it shown that all the bonds were ever issued by the company. Thus, the Loon Lake Copper Company's stockholders were also the bondholders under this issue. The evidence further shows that Mr. Dewart, the attorney for the Massachusetts Trust Company was an officer at the time of this bond issue of the Loon Lake Copper Company. (Tr. 35.)

The evidence further shows that J. Webster Hancox was appointed Receiver of the Loon Lake Copper Company on December 29th, 1919; that a large number of claims have been filed with him, including claims for over $9,000.00 for labor. (Tr. 36.) That he is still the acting Receiver, that the only assets

out of which expenses of the receivership can be realized is this property.

The trust deed bore date the 15th day of November, 1918, and provided that it should cover, among other property, the following:

> *"All tangible personal property of every sort and description, whether now owned or hereafter acquired by the company."* (Tr. 28.)

The concluding provision in the trust deed was inserted after the original deed was drawn, and is as follows:

> "Although this Indenture is dated for convenience and for the purpose of reference as of *NOVEMBER* 15, 1918, the actual date of the execution hereof is *NOVEMBER* 27th, 1918." (Tr. 53.)

The date "November 27th, 1918" is in the handwriting of Arnold Whitaker, who is the secretary of the Massachusetts Trust Company. (Tr. 36.)

The concluding words of the trust deed are as follows:

> "IN WITNESS WHEREOF, Loon Lake Copper Company has caused its corporate seal to be hereto affixed and these presents to be *SIGNED, ACKNOWLEDGED AND DELIVERED* in its name and behalf by its President and Secretary, thereunto duly authorized, and Massachusetts Trust Company, in token of its *ACCEPTANCE* of the trusts hereby created, has also executed these presents this *TWENTY-SEVENTH DAY OF NOVEMBER, A. D.* 1918." (Tr. 53.)

Then follows the signing and witnessing of said trust deed, as follows:

"Executed in duplicate.	Loon Lake Copper Company
Signed, sealed and Delivered in the presence of Merritt Stegmon	By James C. McCormick, *President* By Ralph L. Flanders, *Secretary* Corporate seal: Loon Lake Copper Company, Washington.
Signed, sealed and Delivered in the presence of Merritt Stegmon	Massachusetts Trust Company By Edgar R. Champlin, *President* Arnold Whittaker, *Secretary* Seal: Massachusetts Trust Company, Boston, Mass., Incorporated 1914." (Tr. 54.)

Then follows the affidavit of good faith, made in pursuance of the laws of the State of Washington, by James C. McCormick, President, and Ralph L. Flanders, Secretary of the Loon Lake Copper Company, and subscribed and sworn to on the 27th day of November, 1918, before A. Whitaker. (Tr. 54-55.)

Then follows the acknowledgment of the Loon Lake Copper Company, and the attaching of its corporate seal by its President, James C. McCormick and its Secretary, Ralph L. Flanders, before A. Whitaker, made on the 27th day of November, 1918. (Tr. 55-56.)

Then follows the acknowledgment of the Massachusetts Trust Company by Edgar R. Champlin and Arnold Whittaker, President and Secretary, respectively, of said Massachusetts Trust Company, made on the 29th day of November, 1918. (Tr. 56-57.)

The trust deed was filed for record at Colville, Stevens County, Washington, on December 11th, 1918. (Tr. 57.)

The appellant attempted to show, contrary to the terms of the trust deed, that delivery and acceptance took place on December 4th, 1918, and introduced for that purpose the deposition of Mr. Whittaker, which was received in evidence over the objection of the Receiver.

Mr. Whittaker testified that the trust deed was delivered to them and acknowledged by them on the dates as shown on the instrument; that it was their custom not to accept an instrument until their attorney had passed upon same; that they, therefore, sent the same to their attorney, who, on December 4th, 1918, sent the same to be recorded. (Tr. 30-34.)

Mr. Dewart, the attorney for the plaintiff, testified that he was an officer of the Loon Lake Copper Company; that the money received from the sale of the bonds was used in the purchase of machinery, and other supplies, and that the money was expended after the bond issue was made, within the following year. (Tr. 34-35.) That practically all the bonds sold were purchased by the stockholders of the Loon Lake Copper Company. (See stipulation.)

The defendant Receiver duly and regularly entered his objections to all the testimony of Mr. Whittaker and Mr. Dewart. (See Stipulation on file.)

ARGUMENT.

Counsel for appellant, cites, and quotes from authorities to prove that execution of a deed is not complete until the instrument is delivered and accepted. The authorities would be in point if we were attempting to rely on the date of this instrument, to-wit: November 15th, 1918, as the date of its delivery. However, the authorities are beside the point in this case. The signing, acknowledging and delivering are all steps in the execution. The instrument under consideration specified the date of execution thereof:

> "ALTHOUGH THIS INDENTURE IS DATED FOR CONVENIENCE AND FOR THE PURPOSE OF REFERENCE AS OF NOVEMBER 15, 1918, THE ACTUAL DATE OF THE EXECUTION HEREOF IS *NOVEMBER* 27th, 1918."

It also specifies the date of its *delivery and acceptance* thereof, to-wit: The 27th day of November, 1918.

> "IN WITNESS WHEREOF, Loon Lake Copper Company has caused its corporate seal to be hereto affixed and these presents to be SIGNED, ACKNOWLEDGED AND DELIVERED in its name and behalf by its President and Secretary, thereunto duly authorized, and Massachusetts Trust Company, in token of its *ACCEPTANCE* of the trusts hereby created, has also executed these presents this TWENTY-SEVENTH DAY OF NOVEMBER, A. D. 1918."

The question then before this court is whether the evidence in this case is sufficient to vary the terms of

this written instrument and establish the date of delivery as December 4, 1918, in lieu of November 27, 1918. We submit that there is no evidence whatsoever that would justify the court in taking any other position than that the instrument contained a recital of the true facts relative to both the time of delivery and acceptance of this instrument. Testimony given over five years after the completion of this transaction by a party in interest, and of hearsay nature, we submit is worthless to contradict the terms of this written instrument. Measured by the rule of substantive law governing the admission of evidence, the evidence in this case is of little or no weight. Especially is this true when brought into direct conflict with the terms of an instrument duly executed and which particularly stipulates that the date of *delivery and acceptance*, as well as execution, was November 27, 1918.

> "It has been said, however, that in the trial of equity cases the rule seems to be that courts are very liberal in the admission of evidence, the theory being that in the final determination of the suit only such evidence as is competent and pertinent to the issues will be considered."
>
> 21 *C. J.*, p. 559;
> *Wigmore on Evidence*, Sec. 2400.

We submit that the lower court, sitting as a court of equity, was justified in refusing to give weight or credence to the testimony introduced to vary the terms of this trust deed as to the time of execution. The District Court rightfully disregarded this testimony,

and held that the recitals of the instrument were binding upon the Trustee therein named, as well as upon the Loon Lake Copper Company.

LAW POINTS AND AUTHORITIES.

> "A mortgage of personal property is void as against all creditors of the mortgagor, *BOTH EXISTING AND SUBSEQUENT WHETHER OR NOT THEY HAVE OR CLAIM A LIEN UPON SUCH PROPERTY,* and against all subsequent purchasers, pledgees, and mortgagees and encumbrancers for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and unless it is acknowledged and filed within ten days from the time of the execution thereof in the office of the county auditor of the county in which the mortgaged property is situated as provided by law."

Section 3780 of Remington's Compiled Statutes of Washington.

This Section has been constued and holds that in case the provisions are not complied with, said mortgage as to creditors is absolutely void.

Clark vs. Kilian, 116 Wash. 532;
Fleming vs. Lincoln Trust Co., 124 Wash. 317.

I.

The parties to this instrument by stipulating the date of execution, and making it a part of the instrument, became bound by its terms.

"But when the parties to a written agreement

have made the date of the instrument a material part of the contract, as when the time of performance is fixed with reference to it, parol evidence is not admissible to vary or change it."

9 *Ency. of Evidence*, p. 368.

When the parties hereto stipulated that

"Although the instrument bore date of November 15th, the actual date of execution hereof is November 27th, 1918."

they made this a part of their agreement, and became bound by its provisions.

"An intrinsic agreement providing a *condition qualifying* the operation of a written obliyation is of course equally ineffective; for an obligation absolute is plainly exclusive of a condition."

Wigmore on Evidence, Sec. 2420.

Especially is this true as to third parties, and when this instrument was filed for record, the creditors examining it would be permitted to rely on the date of execution as being that of November 27th, 1918.

This instrument states that it was executed, delivered and accepted on November 27th, 1918. This provision brings the instrument within the following rule:

"* * * where the document is of that sort which permits third persons to acquire independent rights under it, the conduct of the first party, in so dealing with it that as a reasonable consequence it appears to have been delivered, may charge him, even when he has not actually intended to consummate its delivery."

Wigmore on Evidence, Sec. 2420.

ACCEPTANCE NOT NECESSARY

It was not necessary for the Massachusetts Trust Company to formally accept this instrument, in order to complete its delivery, as the rule is:

> "It is not essential to the validity of a deed of trust given as security for a debt that the trustee named therein should accept or assent to it. The instrument need not be delivered to him in order to become operative; and if he refuses to accept or to execute the trust, another trustee may be substituted, or the trust executed under the direction of the court of equity." * * *
>
> 27 *Cyc.*, 1118;
>
> *Field vs. Arrowsmith,* 39 Amer. Dec. 185;
>
> *Walter vs. Johnson,* 37 Tex. 127.

> "Acceptance by a trustee under a trust deed is presumed from time of delivery to him."
>
> 19 *R. C. L.*, 280;
>
> *Bowden vs. Parrish,* 9 S. E. 616.

There can be no doubt under the testimony but what the Loon Lake Copper Company executed and delivered this instrument as a binding trust deed on the 27th day of November, 1918. It not being necessary for the Massachusetts Trust Company to accept thereunder, the testimony introduced by plaintiff, even if admissible, would not change the fact that the execution and delivery by the Loon Lake Copper Company made this a binding obligation.

It would make no difference whether the Massa-

chusetts Trust Company ever accepted this instrument or not. The question would be when the mortgagor actually delivered this instrument. Under the testimony, and under the trust deed, introduced in evidence here, it is apparent that the execution, including delivery, took place on November 27th, 1918. It is also equally apparent that the Massachusetts Trust Company accepted (even though it was not necessary for them to do so to complete the delivery) their duties on the same date.

We submit, therefore, that under the covenants in this trust deed, that the date of execution and delivery and acceptance by all the parties to this instrument as being November 27th, 1918, is controlling in this case.

We submit further that under the law, delivery of this instrument took place on said date, and said instrument became binding on said date, and that the District Court was correct in holding that the lien created by said trust deed was not a lien against the personal property of the Loon Lake Copper Company, as against the rights of the creditors represented by the Receiver in this action.

II.

The second reason why this decree of the lower court was correct, but upon which point the lower court did not rule, was that after-acquired property was not covered by this instrument. It will be noted

by the above quoted provision from the trust deed that this instrument covered "all tangible personal property of every sort or description, whether now owned, or hereafter acquired by the company." The evidence in this case shows that all the personal property which this Receiver is claiming title to free of the lien of this trust deed was purchased after the execution and filing of the trust deed. (Tr. 34.)

In the State of Washington, where this contract was to operate, the statute covering personal property which may be mortgaged is as follows:

> "PROPERTY SUBJECT TO.—Mortgages may be made upon all kinds of personal property, and upon the rolling stock of a railroad company and upon all kinds of mcahinery, and upon boats and vessels, and upon portable mills, and such like property, and upon growing crops and upon crops before the seed theerof shall have been sown or planted; Provided, that the mortgaging of crops before the seed thereof shall have been sown or planted, for more than one year in advance, is hereby forbidden, and all securities or mortgages hereafter executed on such unsown or unplanted crops are declared void and of no effect, unless such crops are to be sown or planted within one year from the time of the execution of the mortgage."

Remington's Compiled Statutes of Wash., Sec. 3779.

Under the common law, after-acquired personal property is not subject to the lien of a chattel mortgage.

"At common law, a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor, or potentially belonging to him as an incident of other property then in existence and belonging to him."

Jones on Chattel Mtgs., Chap. IV, Sec. 138.

Upon either theory the trust deed sued upon in this action is not a lien against the personal property to which this Receiver is laying claim of title.

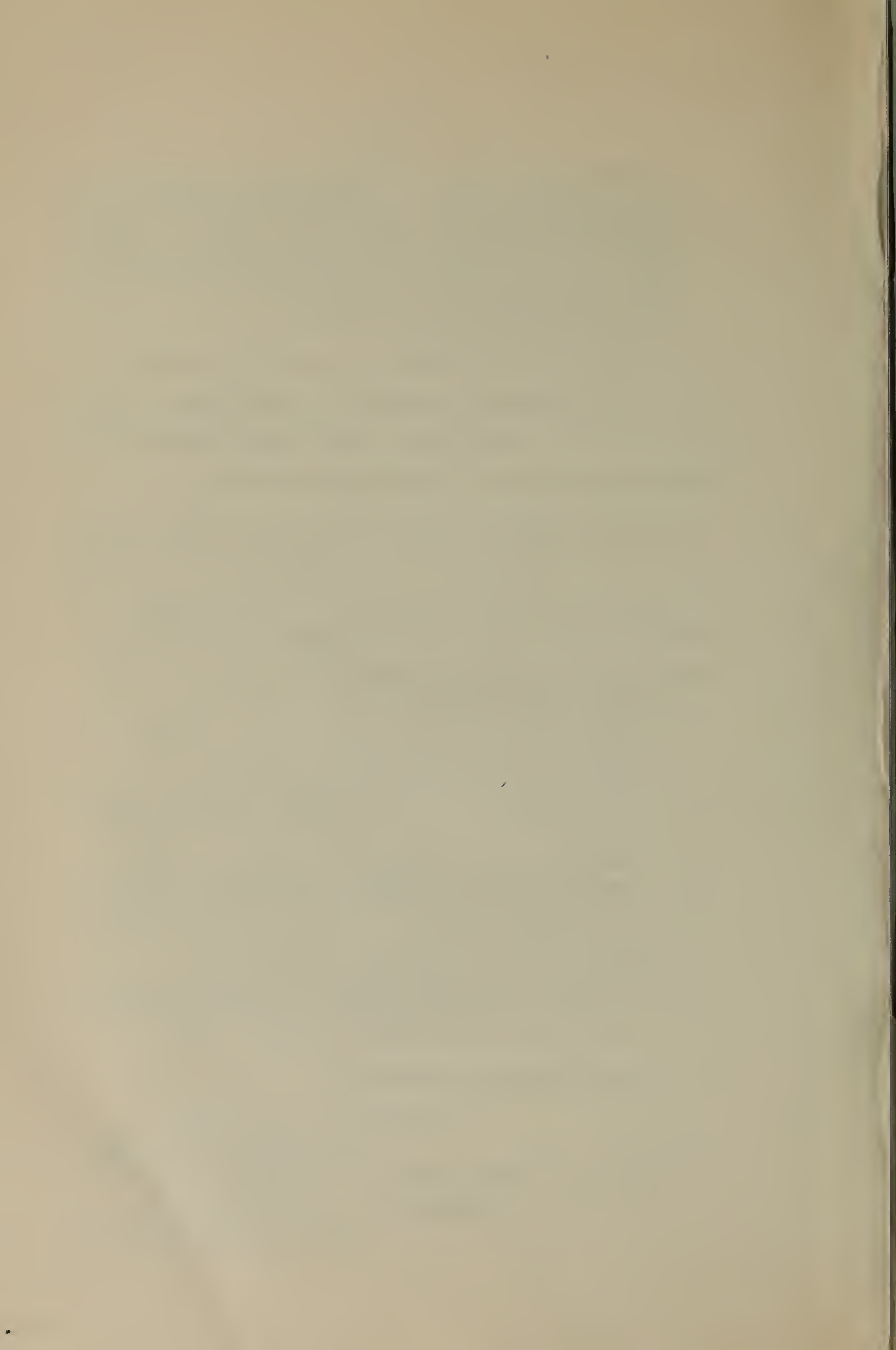
The trust deed, we believe, is void as to the creditors, for the reasons set forth herein, yet we wish to submit that the property covered by the trust deed should be first subject to the Receiver's fees and expenses in preserving the same.

23 *R. C. L.,* Sec. 119;

High on Receivers, Sec. 809;
Dalliba vs. Wurschell, 82 Pac. 107;
Knickerbocker vs. McKinley, 50 N. E. 330 (Ill.);
Hooper vs. Central Trust Co., 32 Atl. 505;
Farmers' Loan vs. Bankers' Telephone, 31 L. R. A. 403 (N. Y.);
City Bank vs. Bryan, 86 S. E. 8 (W. Va.);
Huling vs. Jones, 60 S. E. 874;
Orchard vs. Exchange Nat'l. Bk., 98 S. W. 824;
Hewett vs. Walters, 119 Pac. 705 (Ida.).

Respectfully submitted,

J. WEBSTER HANCOX,
For Himself as Receiver,
SAMUEL R. STERN, *and*
ALBERT I. KULZER,
Attorneys for Receiver.



No. 4392

United States
Circuit Court of Appeals
For the Ninth Circuit.

BERNARD WARD and T. FURIHATA,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILED
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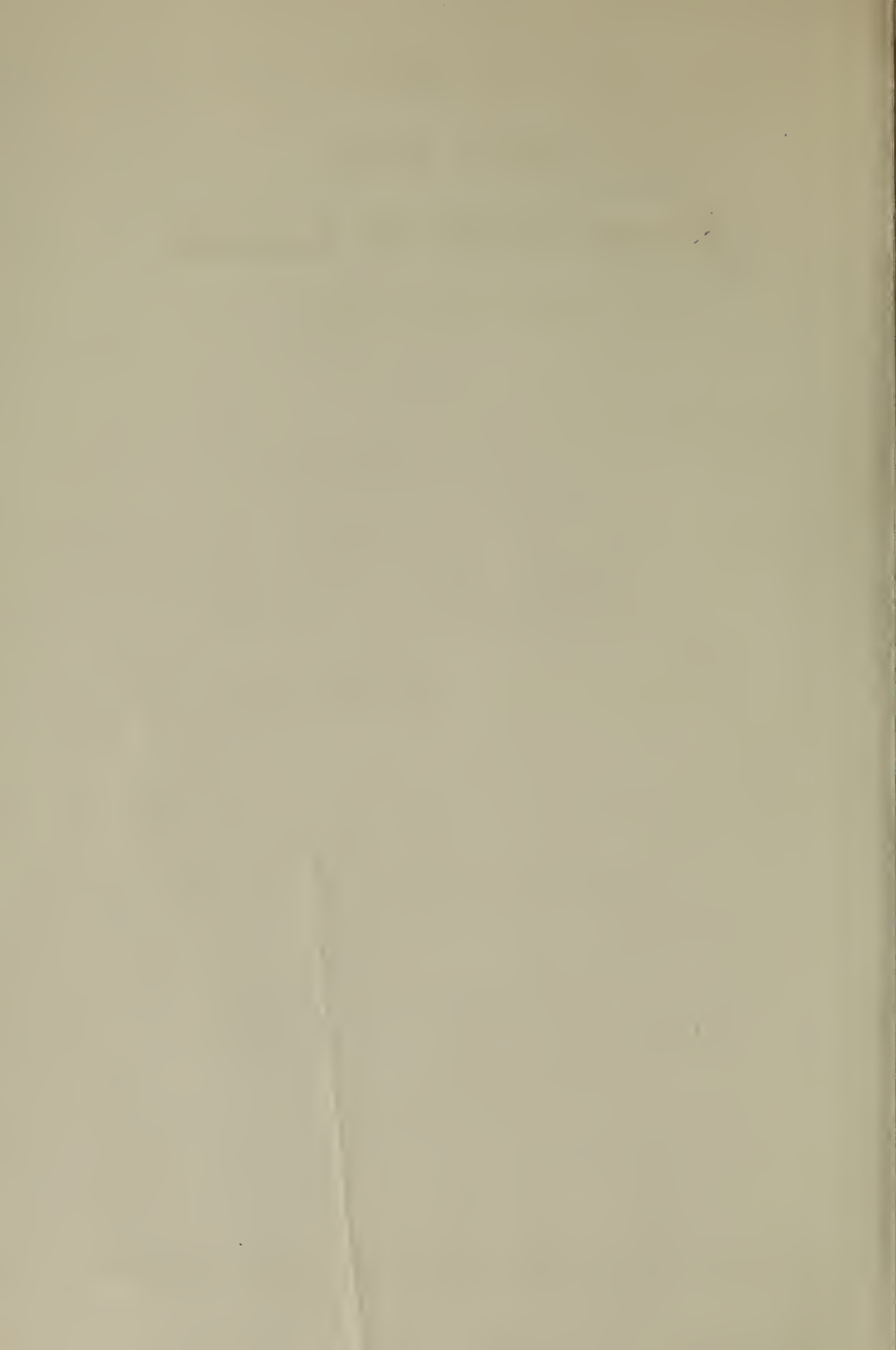

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Appeal and Bail Bond (Bernard Ward)...... 54
Assignments of Error (Bernard Ward)....... 42
Assignments of Error (T. Furihata).......... 46
Bill of Exceptions.......................... 14
Bond on Appeal (T. Furihata).............. 57
Certificate of Clerk U. S. District Court to Transcript of Record.................. 71
Citation on Writ of Error (Bernard Ward)... 77
Citation on Writ of Error (T. Furihata)...... 78
Hearing on Motion for New Trial (Defendant Ward)........................... 11
Hearing on Motion in Arrest of Judgment (Defendant Ward).................... 11
Information........................... 2
Instructions of Court to the Jury............ 24
Motion for New Trial (Hoffman and Furihata)........................... 11
Motion for New Trial on Behalf of Defendant Bernard Ward..................... 10
Motion for New Trial on Behalf of Defendants Emil Hoffman and T. Furihata........... 9
Names and Addresses of Counsel............ 1

Index. Page

Order Allowing Writ of Error and Fixing Amount of Bond (Bernard Ward)....... 52
Order Allowing Writ of Error and Fixing Amount of Bond (T. Furihata)......... 53
Order Extending Time to and Including April 26, 1923, to File Bill of Exceptions (Bernard Ward) 60
Order Extending Time to and Including April 26, 1923, to File Bill of Exceptions (T. Furihata) 61
Order Extending Time to and Including May 23, 1923, to File Bill of Exceptions (Bernard Ward)........................... 62
Order Extending Time to and Including May 26, 1923, to File Bill of Exceptions and Extend Term (T. Furihata)................ 63
Order Re Bill of Exceptions and Extending Time to and Including June 25, 1923, to File Record 64
Order Extending Time to and Including July 31, 1923, to File Record (T. Furihata).... 65
Order Extending Time to and Including August 15, 1923, to File Record (Bernard Ward). 66
Order Extending Time to and Including August 25, 1923, to File Record (T. Furihata).... 67
Order Settling Bill of Exceptions........... 35
Petition for Writ of Error (Bernard Ward).. 37
Petition for Writ of Error (T. Furihata)..... 40
Pleas and Trial 6
Praecipe for Transcript of Record.......... 68
Sentence (Bernard Ward).................. 13

Index. Page

Sentence (T. Furihata)........................ 12
Stipulation Re Printing Transcript of Record. 70

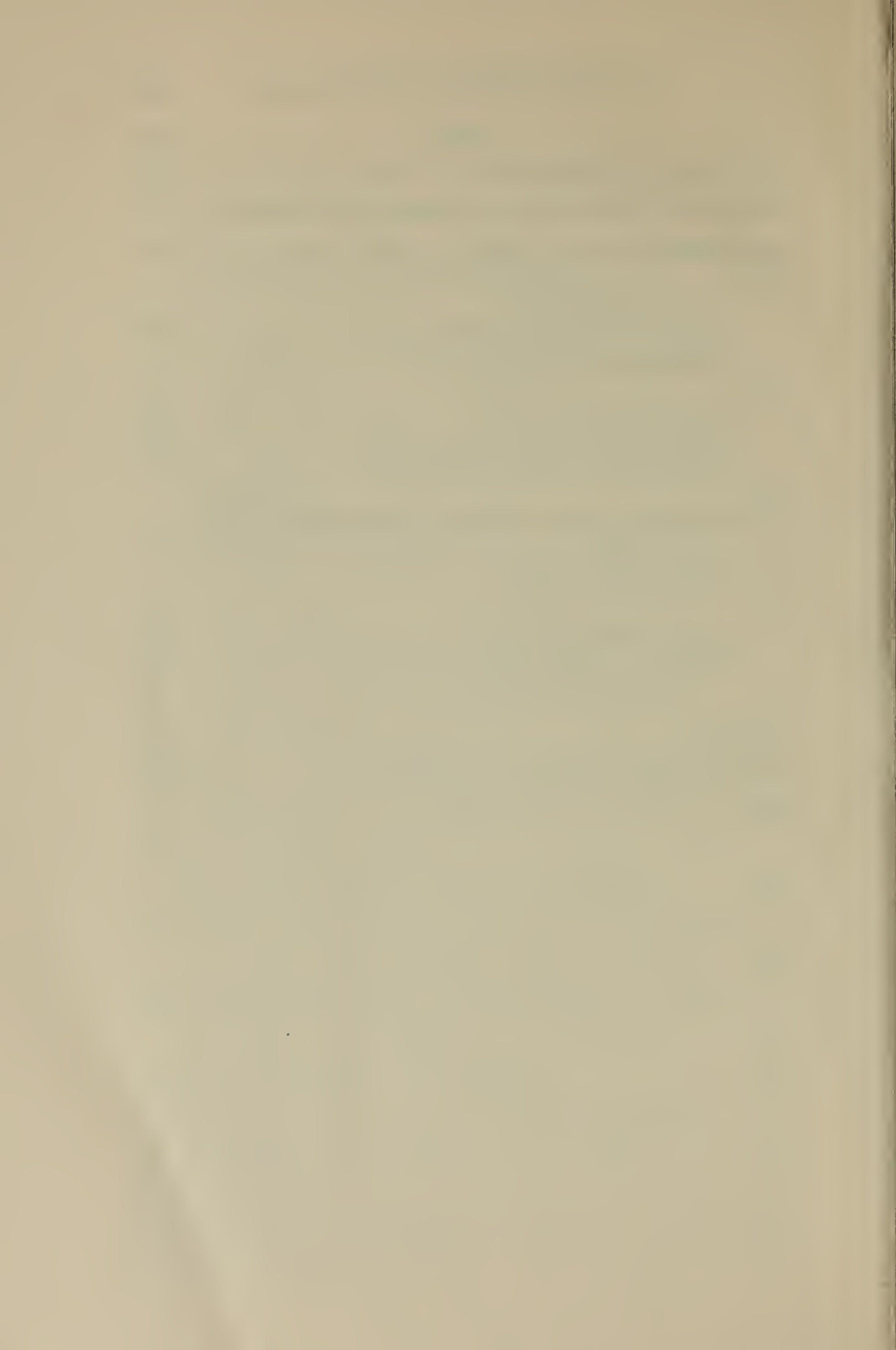
TESTIMONY ON BEHALF OF THE GOVERNMENT:

JUSTI, WALTER M. 17
O'HARA, GORDON B. 15
Cross-examination 16
STIMSON, G. E. 18
WHITNEY, WILLIAM M. 18

TESTIMONY ON BEHALF OF DEFENDANTS:

HOFFMAN, EMIL 22
Cross-examination 23
WARD, BERNARD 19
Cross-examination 21

Verdict 8
Writ of Error (Bernard Ward).............. 73
Writ of Error (T. Furihata)................ 75



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*Page-number appearing at foot of page of original certified Transcript of Record.

United States District Court, Western District of Washington, Northern Division.

November, 1922, Term.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMIL HOFFMAN, BERNARD SHAW and T. FURIHATA,

Defendants.

INFORMATION.

BE IT REMEMBERED, that Thomas P. Revelle, Attorney of the United States of America for the Western District of Washington, who for the said United States in this behalf prosecutes, in his own person comes here into this District Court of the said United States for the district aforesaid on this —— day of November, in this same term, and for the said United States gives the Court here to understand and be informed that as appears from the affidavit of Gordon B. O'Harra made under oath, herein filed:

COUNT I.

That on the seventeenth day of August, in the year of our Lord one thousand nine hundred and twenty-two, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, EMIL HOFFMAN, BERNARD SHAW, and T. FURI-

HATA (whose true given name is to the said United States Attorney unknown), then and there being, did then and there knowingly, willfully and unlawfully have and possess certain intoxicating liquor, to wit, twenty-seven (27) bottles each containing one-fifth (1/5) gallon of a certain liquor known as whisky, thirteen (13) pints of a certain liquor known as whisky, sixty (60) pints of a certain liquor known as distilled spirits, seventeen (17) quarts of a certain liquor known as beer, and four (4) bottles each containing one-fifth (1/5) gallon of a certain liquor known as gin, all of the above herein described liquor then and there containing more than one-half of one [2] per centum of alcohol by volume and then and there fit for use for beverage purpose, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said EMIL HOFFMAN, BERNARD SHAW, and T. FURIHATA for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said EMIL HOFFMAN, BERNARD SHAW, and T. FURIHATA, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT II.

And the said United States Attorney for said Western District of Washington further informs the Court that on the seventeenth day of August, in the year of our Lord one thousand nine hundred and twenty-two, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, EMIL HOFFMAN, BERNARD SHAW, and T. FURIHATA (whose true given name is to the said United States Attorney unknown), then and there being, did then and there knowingly, willfully and unlawfully sell certain intoxicating liquor, to wit, two (2) bottles each containing one-fifth (1/5) gallon of a certain liquor known as whisky, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said sale by the said EMIL HOFFMAN, BERNARD WARD and T. FURIHATA, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed [3] October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT III.

And the said United States Attorney for said Western District of Washington further informs the Court that on the seventeenth day of August,

in the year of our Lord one thousand nine hundred twenty-two, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, and at a certain place situated at 606 Second Avenue, in the said city of Seattle, EMIL HOFFMAN, BERNARD WARD and T. FURIHATA (whose true given name is to the said United States Attorney unknown) then and there being, did then and there and therein knowingly, wilfully and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling and bartering intoxicating liquors, to wit, whisky, distilled spirits, beer, gin, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the EMIL HOFFMAN, BERNARD WARD and T. FURIHATA, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney,
CHAS. E. ALLEN,
Assistant United States Attorney.

Let warrant issue.
Bail fixed $1,000.00.

NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. November 14, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [4]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMIL HOFFMAN, BERNARD WARD and T. FURIHATA,

Defendants.

PLEAS AND TRIAL.

Now on this 6th day of March, 1923, all three defendants come into open court with John F. Dore and F. C. Reagan, their attorneys, and each defendant here and now enters his plea in open court of not guilty to the information herein. C. P. Moriarty is present in behalf of the Government. Whereupon all parties being present, a jury is empanelled and sworn as follows: Herman A. Smith, Ole Stadshaug, Charles R. Kearny, Solomon Prottas, Harold H. Sanderson, Bert B. Griswold, Harry R. Rogers, Fred E. Phillips, G. J. McCormick, Arthur A. Richardson, Louis A. Rothe and John S. Riely. Upon motion of John F. Dore, all witnesses are

excluded from the jury room except when testifying. Statement is made to the jury for the Government by C. P. Moriarty. Government witnesses are sworn and examined as follows: Gordon B. O'Harra, Walter M. Justi, W. M. Whitney, and G. E. Stimpson. Government exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 are introduced as evidence. Government rests. Motion is made by defendants that Government be required to elect which group of liquor set forth in count I it will select to establish charge of possession. Said motion is granted. J. F. Dore for defendants moves for a directed verdict of not guilty as to defendant Ward on count I, as to defendant Hoffman on count III and as to defendant Furihata on count II. All said motions are denied with exception allowed. Defendant's witnesses are sworn and examined as follows: Bernard Ward, Emil Hoffman, R. C. Beach, H. G. Stout and B. Angelo. This cause is continued to 10 A. M. to-morrow.

Journal #11, page 43. [5]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMIL HOFFMAN, BERNARD WARD and T. FURIHATA,

Defendants.

VERDICT.

We, the jury in the above-entitled cause, find the defendant Emil Hoffman, yes, is guilty as charged in Count I of the information herein; and further find the defendant Bernard Ward is not guilty, as charged in Count I of the information herein; and further find the defendant T. Furihata is guilty, as charged in Count I of the information herein; and further find the defendant Emil Hoffman is guilty, as charged in Count II of the information herein; and further find the defendant Bernard Ward is guilty, as charged in Count II of the information herein; and further find the defendant T. Furihata is guilty, as charged in Count II of the information herein; and further find the defendant Emil Hoffman is guilty, as charged in Count III of the information herein; and further find the defendant Bernard Ward is not guilty, as charged in Count III of the information herein; and further find the defendant T. Furihata is guilty, as charged in Count III of the information herein.

HERMAN A. SMITH,
Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 8, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMIL HOFFMAN, BERNARD SHAW and T. FURIHATA,

Defendants.

MOTION FOR NEW TRIAL ON BEHALF OF DEFENDANTS EMIL HOFFMAN AND T. FURIHATA.

Comes now Emil Hoffman and T. Furihata, defendants in the above-entitled cause, and, appearing for themselves alone, move the Court for a new trial herein upon the following grounds:

1. The verdict is contrary to the law and the evidence.

2. There is no evidence to sustain the verdict.

3. Errors of law occurring at the trial and duly and regularly excepted to.

JOHN F. DORE,

Attorney for Defendants.

Acceptance of service of within motion acknowledged this 17th day of March, 1923.

THOS. P. REVELLE,

Attorney for Plff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 17, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [7]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMIL HOFFMAN et al.,

Defendants.

MOTION FOR NEW TRIAL ON BEHALF OF DEFENDANT BERNARD WARD.

Comes now Bernard Ward, one of the defendants in the above-entitled cause, whose name is given in the information herein as Bernard Shaw, and, appearing separately, moves the Court for a new trial on Count II of the information, upon which he was found guilty, upon the following grounds:

1. The verdict is contrary to the law and the evidence.

2. There is no evidence to sustain the verdict.

3. Errors of law occurring at the trial and duly and regularly excepted to.

4. The verdict of guilty on Count II and the verdict of not guilty on Count I of the information

is in law and in fact so inconsistent that the same cannot stand.

JOHN F. DORE,
Attorney for Defendants.

Acceptance of service of within motion acknowledged this 17th day of March, 1923.

THOS. P. REVELLE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 17, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EMIL HOFFMAN, BERNARD WARD and T. FURIHATA,
Defendants.

HEARING ON MOTION FOR NEW TRIAL (DEFENDANT WARD).

HEARING ON MOTION IN ARREST OF JUDGMENT (DEFENDANT WARD).

MOTION FOR NEW TRIAL (HOFFMAN AND FURIHATA).

Now, on this 26th day of March, 1923, the above

motions come on for hearing, all motions are argued and all are denied with exceptions allowed.

Journal #11, page 77. [9]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

T. FURIHATA,

Defendant.

SENTENCE (T. FURIHATA).

Comes now on this 26th day of March, 1923, the said defendant T. Furihata into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act and that he be punished by being imprisoned in the King County Jail or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States for the term of six months on count

II and to pay a fine of $300.00 *dollars* on count I and a fine of $1,000.00 *dollars* on count II of the information. And the said defendant is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree, #3, page 402. [10]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERNARD WARD,

Defendant.

SENTENCE (BERNARD WARD).

Comes now on this 26th day of March, 1923, the said defendant Bernard Ward into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant is guilty of violating the National Prohibition Act and that he be punished

by being imprisoned in the King County Jail or in such other place as may be hereafter provided for the imprisonment of offenders against the laws of the United States, for the term of two months on count II of the information. And the said defendant Bernard Ward is now hereby ordered into the custody of the United States Marshal to carry this sentence into execution.

Judgment and Decree #3, page 402. [11]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERNARD WARD,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 6th day of March, 1923, at the hour of ten o'clock in the forenoon, the above-entitled cause came on regularly for trial in the above-entitled court, before the Honorable Jeremiah Neterer, Judge thereof; the plaintiff appearing by Thomas P. Revelle and Charles P. Moriarty, United States Attorney and Assistant United States Attorney, respectively, and the defendant being present in person and by his counsel, John F. Dore.

A jury having been regularly and duly impanelled and sworn to try the cause, and the Assistant United States Attorney having made a statement to the jury, the following evidence was thereupon offered:

TESTIMONY OF GORDON B. O'HARA, FOR THE GOVERNMENT.

GORDON B. O'HARA, a witness produced on behalf of the Government, being duly sworn, testified as follows:

I am a Federal Prohibition Agent, and was on August 17, 1922. I met the defendant Hoffman on that day. About three o'clock in the afternoon I went to the New Avon Hotel, at 606 Second Avenue, Seattle, Washington, Hoffman was at the desk of the hotel. I went up and asked him if I could get a drink of whisky, and he told me I could. He took me in the elevator to the sixth floor and took me into room 606 and served me with a drink of whisky from a pint bottle, [12] and I gave him fifty cents for the drink. I told him at that time that I might want to put on a little party later on, and asked him if he could supply a quantity of liquor, and he told me he could supply any amount I wanted. (St., p. 2.) I went back to the Prohibition Office and secured a search-warrant and with Agent Justi I went to the hotel about 4:30. Hoffman was not there. Ward was sitting on a bench, reading a paper. In about a minute Hoffman came down in the elevator, I spoke to him and told him I wanted to get some liquor.

(Testimony of Gordon B. O'Hara.)
Hoffman got in the elevator and as it was starting up called to Ward. There were four of us in the elevator; Justi, Ward, Hoffman and myself. Hoffman was operating the elevator. As we were going up in the elevator, I told Hoffman that we wanted some Bourbon. Hoffman said, "You can't get Bourbon, whisky; all I have is Old Parr, which is very excellent whisky." I got out of the elevator on the second floor, together with Justi, and the elevator went upstairs. Three or four minutes later Ward met us on the second floor and told us to go into the parlor of the hotel, in room 204, and Hoffman would bring the stuff there. We went into room 204 and later Hoffman came in with two bottles (identified as Government's Exhibits 1 and 2). I opened one of them and handed Hoffman twenty dollars in marked money. Hoffman was then placed under arrest by Agent Justi. I took the twenty dollars out of Hoffman's hand and served a search-warrant on him. At the time the sale was made Ward was not present. Later on I saw Ward standing in the hallway of the hotel. Ward was not present when Hoffman delivered me the whisky. I arrested Ward later. I searched the hotel and found liquor in various rooms. Ward denied ownership of any liquor. (St., pp. 3–14.)

Cross-examination.

The New Avon Hotel is six stories and a basement high. Hoffman was hotel clerk. I know that Ward was manager of the Ranier Taxicab Com-

(Testimony of Gordon B. O'Hara.)

pany, and that the Rainier Taxicab Company had a switchboard [13] and office in the hotel building. (St., pp. 16–17.)

TESTIMONY OF WALTER M. JUSTI, FOR THE GOVERNMENT.

WALTER M. JUSTI, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I am and was a Federal Prohibition Agent on August 17, 1922. About four o'clock in the afternoon of that day I went to the New Avon Hotel. We waited in the lobby and when the elevator came down Mr. Hoffman was in it. I saw Mr. Ward sitting in the lobby. O'Hara and I stepped into the elevator. Hoffman was the operator. He called to Ward. As he took us upstairs Agent O'Hara told him he wanted a bottle of Scotch and a bottle of Bourbon. Hoffman said they couldn't furnish that but that they could furnish Old Parr and that was very fine. We said that would be all right. O'Hara and I got out on the second floor of the hotel. Hoffman operated the elevator up to some upper floor. Later Ward saw us on the second floor and told us to go into the parlor. Room 204, and we would wait there. Later Hoffman came into the parlor, room 204, and handed O'Hara two bottles. As Hoffman handed O'Hara the two packages O'Hara handed Hoffman twenty dollars. I

(Testimony of Walter M. Justi.)
marked the bills and can identify them. Ward was not present at the time of the sale. (St., pp. 22–25.)

TESTIMONY OF WILLIAM M. WHITNEY, FOR THE GOVERNMENT.

WILLIAM M. WHITNEY, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I never saw Ward before his arrest. I made a search of rooms in the New Avon Hotel on August 17, 1922, and found liquor in a great many of the rooms. (The witness gave the number of the rooms.) [14] (St., pp. 20–30.)

It was admitted at this time that Prohibition Agents Lindville and Stetson would testify that liquor had been found in various rooms in the New Avon Hotel. (St., p. 31.)

TESTIMONY OF G. E. STIMSON, FOR THE GOVERNMENT.

G. E. STIMSON, a witness produced on behalf of the Government, being duly sworn, testified as follows:

Direct Examination.

I am the rental manager for Henry Broderick & Company. The defendant Furihata rents the New Avon Hotel. (St., p. 32.)

At the close of the Government's case a motion

was made for a directed verdict for the defendant Ward on every count. The motion was denied as to each count, and an exception was allowed. (St., pp. 33–36.)

DEFENDANTS' EVIDENCE.

TESTIMONY OF BERNARD WARD, ONE OF THE DEFENDANTS, TESTIFYING FOR HIMSELF.

BERNARD WARD, a defendant, produced as a witness on his own behalf, being duly sworn, testified as follows:

Direct Examination.

I am manager of the Rainier Taxicab Company. The company has approximately thirty drivers. I was at the dispatcher's board. I was operating the switchboard, which has a hundred and fifty trunks on it. This was the switchboard we got our calls on from parties wanting cabs, and our reports from the drivers. The Rainier Taxicab Company is owned by a man named Archie Murray. I have no interest in it. The elevator of the hotel is right beside the switchboard. [15] The New Avon Hotel is rather a small hotel. They have one clerk that acts as operator of the elevator and bell-boy and clerk. When he is rushed it is customary for employees of the Taxicab Company to help him out on the elevator while he is rooming guests. He takes guests up to the rooms and while he is taking them to their rooms the Rainier Taxi-

(Testimony of Bernard Ward.)

cab employees will run the elevator for the convenience of the other guests. I have done it thousands of times. I had no connection in any way with the hotel, except to run the switchboard. On the day in question I was standing at the switchboard reading a newspaper. I was about half asleep. Our dispatcher was sick that day. Hoffman stuck his head around the corner and called me and asked me if I would run the elevator for him. I told him I would. I went up to the second floor. Hoffman and these two men got out. They had a conversation, I stayed in the elevator. I did not hear the conversation. Hoffman got back into the elevator and asked me if I would run them down. I said I would. He went on up to the third floor, got out of the elevator and just then the bell rang and he said, "Someone is there for a room." I ran the elevator down to the first floor and there were three or four people there. Hoffman started rooming the people. He called to me from the desk and asked me if I could go up to the second floor and tell the two gentlemen that he had left on the second floor to step in the parlor, that he would be back in a few minutes. He said to leave the elevator down and walk up the stairs. I went up and met Agents Justi and O'Hara. I can't tell which is which. They were standing in the hallway. I told them that Hoffman said for them to step into the parlor, that he would be up in a few minutes, that he was very busy doing his work as clerk. That is all the conversation I had

(Testimony of Bernard Ward.)
with them. I don't live in the hotel; I never sold any liquor; I am married and live with my family on Lakeview Boulevard. My only connection with the hotel was that the Rainier Taxicab Company has its [16] office there. Nobody gave me any money; I gave nobody any whisky; nobody saw me with any whisky. (St., pp. 36–43.)

Cross-examination.

I have run that elevator sometimes ten, fifteen or twenty times a day. I did that when I only represented the Rainier Taxicab Company. I was the only one representing the Rainier Taxicab Company there except the dispatcher, and he was sick that day. I didn't get out of the elevator on the second floor. This was about three or four o'clock, to the best of my knowledge. I went up to the third floor with the elevator; I didn't get out; I was in the same position in the elevator when they came down to the first floor *we* when I got in it. Hoffman was running the elevator. Hoffman got out of the elevator at the third floor; the bell rang and he said, "I think there is someone wanting a room." He hesitated, and then got in and got hold of the lever and went down to the bottom, and I was still in the same position I had been in. I never moved out of the same position. I got out of the elevator when it got to the bottom. I went and sat down again and began to doze. I saw some people standing at the desk and Hoffman was assigning them to rooms. He came over to me and said, "I have some people on the second floor. Will you tell them

(Testimony of Bernard Ward.)
I will be back in a few minutes. Go back in the parlor." I started for the elevator and he said, "Hold the elevator, I want to use it." I walked up the stairs to the second floor and met these two men. I said to them, "Will you step into the parlor, the clerk will be up in a few minutes; he is busy." Nothing was said about liquor by anybody. I and the drivers have run the elevator lots of times. The Taxicab Company pays $110 a month for their office. (St.. pp. 44–50.) [17]

TESTIMONY OF EMIL HOFFMAN, ONE OF THE DEFENDANTS, TESTIFYING FOR HIMSELF.

EMIL HOFFMAN, a defendant, produced as a witness on his own behalf, being duly sworn, testified as follows:

Direct Examination.

I am hotel clerk at the New Avon Hotel. I made a sale of liquor to O'Hara and the other agent and got $20 for it. When I got it in my hands they grabbed my hands. Mr. Ward had no interest in any of the liquor, had no interest in this sale, and the Rainier Taxicab Company had nothing to do with it. I made the sale on my own behalf. I made a sale earlier in the day, up in room 606. That was my own individual transaction. I carried on all the conversation with the agent. When I got into the elevator I called to Mr. Ward and said, "Will you run this elevator for about two min-

(Testimoy of Emil Hoffman.)

utes?" And he said, "All right." He got in the elevator and went up to the second floor. I got out with Mr. O'Hara and Mr. Justi. They asked me for a bottle of Scotch and a bottle of Bourbon. I told them I could give them Scotch but not the Bourbon. I got back in the elevator and went up to the third floor. I just got to the third floor and the bell rang, and I said, "I guess I better go down again; there is someone down there that probably wants a room." I went downstairs and there was a couple of people waiting to get some rooms. While they were registering I told Mr. Ward to go up to the two men standing on the second floor and tell them to go into the parlor, 204, and wait there for me, and I registered the people. Room 204 is a parlor and lounging-room. In about ten minutes I got back. I went up in the elevator alone, got two bottles of whisky, brought it back and delivered to the agents and took the money. There was no one in the room besides myself and the agents when I made the sale. Whatever sales were made that day was my own business. Mr. Furihata, the owner of the hotel, was not there at all that day. (St., pp. 50–54.) [18]

Cross-examination.

I am still working at the New Avon Hotel. I am room clerk and bell-hop. I run the elevator and take people up to rooms. I am employed by Furihata. I went up to the second floor, Agents O'Hara, Justi and myself. O'Hara and Justi got out on the second floor. I followed them out.

(Testimoy of Emil Hoffman.)

They asked me for a bottle of Bourbon and a bottle of Scotch. I told them I had no Bourbon, but I had Old Parr. The elevator was open, we were talking very low. I went up to the third floor. When I got to the third floor the bell of the elevator rung and I said, "There must be somebody down there." I went down and there was a couple of people waiting. I said to Ward, "Will you go upstairs and tell them two men on the second floor to go into room 204; I will be up there in a little while." After I got through registering the people I went up and roomed them, on the fourth floor. When I came downstairs Ward was sitting in the lobby dozing. I went up to room 402, got the two bottles and brought them down on the second floor and delivered them. (St., pp. 54–60.)

Motion for dismissal as to the defendant Ward was renewed upon each count of the indictment. The motion was denied and an exception allowed. (St., p. 65.)

The Court thereupon gave the following instructions to the jury, to which the defendants took the following exceptions and the exceptions were allowed: [19]

INSTRUCTIONS OF COURT TO THE JURY.

The COURT.—Gentlemen of the Jury: The defendants are charged in the information in three counts, with a violation of the National Prohibition Act. Count I charges them with the possession; Count II with the sale of intoxicating liquor con-

taining the prohibited alcoholic content; and Count III charges them with maintaining a common nuisance. Each of the defendants have pleaded not guilty to each count in the information, that means they deny all of the material allegations in each count. They are presumed innocent until they are proven guilty by the Government beyond every reasonable doubt; this presumption continues with them throughout the trial, and until you are convinced by the testimony by the degree of proof which I have indicated; the burden is upon the Government to show they are guilty by that degree of proof.

You are instructed that there was testimony introduced in this case with relation to liquor being in room 606, and likewise in room 217. You are instructed that that liquor in those rooms cannot be considered against the defendants, and that the liquor in rooms 217 and 606 have no relation, because the testimony shows that that was in the exclusive possession of the Taxicab Company, and that in room 606, was in the exclusive possession of the defendant Hoffman, so that cannot be considered against either of the other defendants. With relation to the charge against these defendants, you will consider the testimony with relation to the liquor which was testified to in the other rooms, and the sale which was testified [20] to by the defendant Hoffman that he made from the liquor which he obtained in room 402, and which he sold in 204. You are instructed that under the evidence which is presented by the defendant Hoff-

man, he is, under his own testimony, guilty of Count I and of Count II, of the possession and sale; that has been likewise stated to you by his counsel in argument. You are instructed with relation to Count III, that under the Prohibition Act it is provided that any room or place where intoxicating liquor is sold, kept or bartered in violation of the prohibition law, is declared a common nuisance. You are instructed that a common nuisance is a nuisance which damages such part of the public as necessarily comes in contact with it. You are instructed, as a matter of law, under the provisions of the National Prohibition Act that where liquor is kept in a hotel upon three different floors in six different rooms, and in one of the rooms at least where the liquor is found serving glasses are, and that liquor is sold upon request, that such a place would be, under the law, a common nuisance, where it is shown that it is open to the public, and persons are being cared for, as in operating hotels. And you are instructed that any person connected with the operation of the hotel who participates in the storing or selling of liquor in such hotel, would be guilty of maintaining a nuisance, whether such person be the owner or an employee of the owner. In this case if you find this place to be a common nuisance under the evidence and the instructions which I have given you, and believe that the defendant Hoffman was in charge [21] of this place for the lessee or owner, shown by the testimony to be the defendant Furihata, he having access to all of these rooms in which the liquor was

stored, and sold liquor in this hotel upon request, then the defendant Hoffman would be guilty of maintaining a nuisance under the National Prohibition Act, whether he was the owner of the place, or proprietor of the place, or not.

You are instructed that a person makes a sale when upon request he delivers the commodity which purchase is sought for a compensation, and the person may make the sale whether he does it personally or does it through another. In this case the testimony is uncontradicted that the defendant Furihata was the proprietor of the hotel. The testimony likewise is that the defendant Hoffman was a clerk and employee in this hotel; he had a master key to all of the rooms in which liquor was found. He testified that he had access to the key that locked the rooms in which the liquor was, and could have gotten the key if he had been permitted by the officers—have gone and gotten it for them, but they would not permit him to go out of their sight.

You are instructed that the proprietor Furihata was in possession presumptively of the entire hotel, and he is in law presumed to be in possession of everything in the rooms which are in his exclusive possession. There is testimony before you that the rooms in which the liquor was found was unoccupied, and you will remember the testimony with relation to the examination of the register, and the statement of the defendant Hoffman, the clerk, with reference to the occupancy of [22] these rooms, and the condition of the rooms on the inside as disclosed by the witnesses as to the evidence of occu-

pancy, and if these rooms were unoccupied then they would be in law presumed to be in possession of the defendant Furihata, the owner or proprietor, and he would be in constructive possession of everything in the room. If Furihata was in possession of the liquor in the rooms and the defendant Hoffman was in his employ, and he had access to the rooms, then the defendant Hoffman's possession of the rooms would be the possession of Furihata, and authorized and presumed to make such disposition as the testimony convinces you from all the facts and circumstances that the authority of his employment warrant. And if you believe from the testimony and the circumstances surrounding that the employment of Hoffman by Furihata covered the authority to dispense or sell liquor and the defendant Hoffman made the sale, as he said he did, then the sale would likewise be the sale of Furihata, no matter where he was, whether in the city, in Tacoma or Portland or where he may have been.

Now, with relation to the knowledge of the defendant Furihata with relation to the authority under which the defendant Hoffman operated, you will take into consideration all of the testimony which has been presented together with all the surrounding circumstances; the condition of the rooms in which the liquor was found; the floors in the hotel in which it was distributed, the quantity found in the several rooms, the time that the defendant Hoffman was employed; he said he was employed five or six days, and take all these things into consideration as to how long this liquor may

have been there, from [23] the circumstances as disclosed, and therefore the active co-operation and direction of the defendant Furihata with relation to it, the defendant Hoffman being a recent employee. And if the defendant Hoffman acted under the authorization of the defendant Furihata, then Furihata would be guilty not only of possession but sale, and likewise a nuisance, if you believe the testimony and the disclosures that have been made, and to which reference has been made in these instructions, supported by the testimony.

As to the defendant Ward, he may not be found guilty for anything in connection with rooms 217 or 606, as I have already told you. The defendant Ward, his mere presence in the hotel would not make him guilty, he was not in the employ of the defendant Furihata. If the defendant Ward is guilty in this case it is upon what he did that day, his conduct in operating the elevator, his relation to the transaction between Hoffman and the agents who bought it, and what, if anything, he said to the operators when they came there for the purpose of purchasing it. He said he did nothing except to operate the elevator as a favor, which he did sometimes. The Government witnesses testified that they asked Ward for some whisky or some liquor, and he said, "We haven't that," and you remember what their testimony was, and if he did actively participate in the operation of the elevator, and carried these parties up and was conscious of what was transpiring, and did it in the advancement of a sale between the parties participating

in it, and did use the conversation and statements that I have indicated, directing or suggesting some other brand instead of that which was demanded, and [24] actively participated in the transaction and closing of the sale, why then he would be guilty of sale, and likewise of possession. If that was the only connection the defendant Ward had with relation to the matter you would not be warranted in finding the defendant Ward guilty of the nuisance count, because that transaction alone, of itself, would not be sufficient to find the defendant Ward guilty of a nuisance, but would be sufficient to find him guilty of possession and of sale.

Now, in this case the defendant Furihata did not take the stand and testify; that is his privilege, and no inference of guilt is to be taken against him because he did not do that. You will simply conclude this case upon the evidence which is presented before you, and on the circumstances which have been detailed by the witnesses, and draw such inferences as are justified from all the facts and circumstances, together with the testimony which has been presented.

Circumstantial evidence is just such testimony as the circumstances show of the facts to exist; it is legal and competent in criminal cases, but the circumstances must be consistent with each other; consistent with the guilt of the parties charged, and inconsistent with their innocence—inconsistent with every other reasonable hypothesis except that of guilt, and when it is of that character then it is sufficient to convict the parties. In this case you

have the direct testimony, and you likewise have the circumstantial evidence, and you will take and weigh the both of them together.

You are the sole judges of the facts, and you [25] must determine what the facts are from the evidence which has been presented. You are likewise the sole judges of the credibility of the witnesses, and in determining the weight or credit you desire to attach to the testimony of any witness you will take into consideration their demeanor upon the stand, the reasonableness or unreasonableness of the story, and all the circumstances which surround the disclosure which has been made. The defendants, of course, are interested, and you will conclude whether their testimony sounds reasonable, or whether they would color their testimony for the purpose of escaping penalty; is there anything that developed on the part of the witnesses for the Government, and because they are Government officials that would cause them to perjure themselves, for the purpose of fastening crimes upon innocent men. It is their duty to see that the laws are enforced, that is what they are employed for; they are not employed to do anything unfair and testify falsely, but are simply employed to find out where laws are violated, and bring the parties fairly before the Court and jury; and it is for you to determine whether they have fairly testified, or whether they have committed an offense by perjuring themselves in trying, as I stated, to fasten a crime upon innocent men. You will consider this case fairly.

You will bear in mind we have just one scale of justice, and that does not respect any nationality; a Japanese or another nationality is entitled to the same presumption and requires from the jury the same burden as a man of our own nationality, and I know you will not be impressed with the fact that one of the defendants is of a [26] different nationality, or make any difference between any of the parties in this trial, but will weigh all the testimony and all the presumptions by the same scale of justice. You will try this case and deliberate upon it fairly. Of course, we cannot have laws unless we have law enforcement; that is the province of juries.

It will require your entire number of twelve to agree upon a verdict, and when you agree you will have it signed by your foreman, who you will elect immediately upon retiring to your jury-room. The verdict is in the usual form; you will write "is" or "not" in front of one of the blanks, as you may find. Any exceptions?

Mr. DORE.—Note the following exceptions. The defendant notes an exception to that instruction in which the Court told the jury the owner of a hotel is presumably in possession of the entire hotel, and the law presumes him to be in the exclusive possession of everything found in the hotel. The instruction is erroneous.

The COURT.—If I used the word "presumption" I will say, where I used the word "presumption" while it may not make any difference, if a

person is in constructive possession of everything in a room of which he has exclusive possession.

Mr. DORE.—We note that exception, that does not apply to hotel proprietors; abstractly it is correct, but not applicable to this case; there is no testimony here that anybody had exclusive possession of anything.

The COURT.—Well, the proprietor is in possession of a room unless some one else is in possession of it.

Mr. DORE.—We wish an exception to that instruction, that [27] a proprietor is in possession of everything in a room that is not occupied by a guest, because he is not in possession of an unoccupied room, unless he has knowledge of what is in it.

The COURT.—The only issue here is liquor; I will say that the testimony shows that the defendant Furihata is the lessor and the proprietor of this hotel, and as such he is in constructive possession of what is in the room, and would be in constructive possession of everything in the room.

Mr. DORE.—I want to note an exception to that instruction. Note an exception to the instruction that one who is an employee of a hotel can be found guilty of maintaining a nuisance, on the ground that the word "maintenance" in itself carries an implication that it does not concern an employee; one must have some control beyond mere employment.

The COURT.—I said and sale, as in this case.

Mr. DORE.—Note an exception to that; the mere fact a man is a janitor—

The COURT.—Yes, it may be noted.

Mr. DORE.—Your Honor told the jury that Hoffman had a master key to rooms that contained liquor; he also had a master key to some of the rooms that did not contain liquor. Also note an exception to that instruction, where a man makes one sale and serving glasses are found in the room of the hotel, and liquor in the room that it makes it a nuisance.

The COURT.—I did not say that; I said the sale as disclosed in this case. [28]

Mr. DORE.—Note an exception to that, also.

(Bailiffs sworn. Jury retire.)

(Jury return into court for further instructions.)

The COURT.—The jury ask this question: Can a defendant be guilty of sale, and, at the same time, not guilty of possession. I will answer that: A person may make a sale and not be in possession, by bringing the parties together, or being a party to bring the parties together and at the sale, and participating himself in carrying out the transaction, and not be in the possession of the liquor himself, it being elsewhere in the possession of some other party, he could be a party to a sale and not be in possession. Does that answer your question?

A JUROR.—Yes.

Mr. REAGAN.—Note an exception.

The COURT.—Yes, note an exception.

(Jury retire.)

And, now, in furtherance of justice, and that right may be done, the said defendant Bernard

Ward tenders and presents to the Court the foregoing as his bill of exceptions in the above-entitled cause, and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record in this cause.

JOHN F. DORE,

Attorney for Defendant Bernard Ward. [29]

Acceptance of service of within bill of exceptions acknowledged this 23d day of May, 1923.

THOS. P. REVELLE,

Attorney for Pltff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 23, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [30]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERNARD WARD et al.,

Defendants.

ORDER SETTLING BILL OF EXCEPTIONS.

The defendants Bernard Ward and T. Furihata in the above-entitled cause having tendered and presented the foregoing as their bill of exceptions

in this cause to the action of the Court, and in furtherance of justice and that right may be done them, and having prayed that the same may be settled and allowed, authenticated, signed and sealed by the Court and made a part of the record herein; and the Court having considered said bill of exceptions and all objections and proposed amendments made thereto by the Government, and being now fully advised, does now in furtherance of justice and that right may be done the defendants, sign, seal, settle and allow said bill of exceptions as the bill of exceptions in this cause, and does order that the same be made a part of the record herein.

The Court further certifies that each and all of the exceptions taken by the defendants, as shown in said bill of exceptions, were at the time the same were taken allowed by the Court.

The Court further certifies that said bill of exceptions contains all the material matters and evidence material to each and every assignment of error made by the defendants and tendered and filed in court in this cause with said bill of exceptions.

The Court further certifies that said bill of exceptions [31] was filed and presented to the Court within the time provided by law as extended by the orders of the Court heretofore made herein.

The Court further certifies that the instructions set forth in said bill of exceptions were given by the Court over the objection of the defendants noted in this bill of exceptions and that no other instruction

was given by the court upon the subject matter contained in said instructions, and that said bill of exceptions contains all exceptions taken by said defendants to said instructions and the said portions thereof.

Done and ordered in open court, counsel for the Government and the defendants now being present, this 31st day of July, 1923.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 31, 1923. F. M. Harshberger, Clerk. [32]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BERNARD WARD,
Defendant.

PETITION FOR WRIT OF ERROR (BERNARD WARD).

In the Above-entitled Court, and to the Honorable JEREMIAH NETERER, Judge Thereof:

Comes now the above-named defendant, Bernard Ward, and by his attorney, John F. Dore, respect-

fully shows that on the 6th day of March, 1923, a jury impanelled in the above-entitled court and cause returned a verdict finding the above-named defendant guilty of the indictment theretofore filed in the above-entitled court and cause; and thereafter, within the time limited by law, under the rules and order of this Court, the defendant moved for a new trial, which said motion was by the Court overruled and an exception thereto allowed; and thereafter, on the 26th day of March, 1923, this defendant was by order and judgment and sentence of the above-entitled court in said cause, sentenced as follows: To be confined in the King County jail for a period of two (2) months on Count II of the indictment.

And your petitioner herein, feeling himself aggrieved by said verdict and the judgment and sentence of the Court herein as aforesaid, and by the orders and rulings of said Court, and proceedings in said cause, now herewith petitions this Court for an order allowing him to prosecute a writ of error from said judgment and sentence to the Circuit Court of Apeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made [33] and provided, to the end that the said proceedings as herein recited, and as more fully set forth in the assignments of error presented herein, may be reviewed and the manifest error appearing upon the face of the record of said proceedings and upon the trial of said cause, may be by said Circuit Court of Appeals corrected, and that for

said purpose a writ of error and citation thereon should issue as by law and ruling of the Court provided; and wherefore, premises considered, your petitioner prays that a writ of error issue to the end that said proceedings of the District Court of the United States for the Western District of Washington may be reviewed and corrected, the said errors in said record being herewith assigned and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, and that pending such final determination, said defendant be admitted to bail.

JOHN F. DORE,
Attorney for Petitioner, Plaintiff in Error.

Acceptance of service of within petition acknowledged this 26th day of March, 1923.

THOMAS P. REVELLE,
Attorney for Plaintiff,
By CHARLES P. MORIARTY.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [34]

In the United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMIL HOFFMAN, BERNARD SHAW and T. FURIHATA,

Defendants.

PETITION FOR WRIT OF ERROR (T. FURIHATA).

To the Above-entitled Court and to the Hon. JEREMIAH NETERER, Judge of the United States District Court Aforesaid:

Comes now T. Furihata, one of the above-named defendants, and by his attorney, Walter Metzenbaum, respectfully shows:

That heretofore on the 7th day of March, 1923, a jury in the above-entitled court and cause returned and filed herein a verdict finding the above-named defendant guilty upon Counts I, II, and III of an indictment theretofore filed in the above-en titled court and cause, and against the defendant herein on the 14th day of Nov., 1922; that thereafter and on the 26th day of March, 1923, the defendant was by the order and sentence of the above-entitled court in said cause sentenced to Count I—$300; Count II—6 months King County Jail; Count III

—$1000; and your petitioner herein, the said defendant T. Furihata, feeling himself aggrieved by the said verdict and the said judgment and sentence of the Court entered herein as aforesaid and by the orders and rulings of said court and proceedings therein, now herewith petitions this court for an order allowing him to prosecute a writ of error from said judgment and sentence to the Circuit Court of Apeals of the United States, for the Ninth Circuit, under the laws of the United States and in accordance with the procedure of said court in such cases made and provided, to the end that the said proceedings as herein recited and more fully set forth in the assignments of error presented herewith may be reviewed and the manifest error appearing from the [35] face of the record of said proceedings may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by the law and the ruling of the Court is provided; whereupon, the premises considered, your petitioner prays that a writ of error do issue to the end that the said proceedings of the United States District Court for the Western District of Washington, may be reviewed and corrected, and said errors in said record being herewith assigned and presented herewith; that pending the final determination of said writ of error by said Appellate Court an order be made and entered herein that all further proceedings shall be suspended and stayed until the de-

termination of said writ of error by said Circuit Court of Appeals.

WALTER METZENBAUM,
Attorney for Petitioner and Plaintiff in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [36]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BERNARD WARD,
Defendant.

ASSIGNMENTS OF ERROR (BERNARD WARD).

Comes now the above-named defendant, Bernard Ward, and in connection with his petition for writ of error in this cause, submitted and filed herewith, assigns the following errors which the defendant avers and says occurred in the proceedings and at the trial in the above-entitled cause, and in the above-entitled court, and upon which he relies to reverse, set aside and correct the judgment and sentence entered herein, and says that there is mani-

fest error appearing upon the face of the record and in the proceedings, in this:

I.

The Court erred in overruling the motion for new trial herein.

II.

The Court erred in overruling the motion in arrest of judgment herein.

III.

The Court erred in failing to set aside the verdict rendered in this cause, for the reason that the same is inconsistent in that the defendant was by the verdict found guilty of selling liquor which the jury found by their verdict that he did not possess with intent to sell. [37]

IV.

Thereafter, and within the time limited by law and the order and rules of this court, said defendant moved for a new trial, which said motion was overruled by the Court, and an exception allowed, which ruling of the Court the defendant now assigns as error.

V.

Thereafter, and within the time limited by law, the defendant moved the Court that judgment and sentence upon the verdict rendered in the above-entitled cause be arrested and stayed, which motion was overruled by the Court and an exception allowed the defendant, and the defendant now assigns as error the overruling of said motion.

VI.

The Court erred in overruling the motion in arrest of judgment entered herein.

VII.

The Court thereafter entered judgment and sentence against said defendant, upon the verdict of guilty rendered upon said indictment, to which ruling and judgment and sentence the defendant excepted, and now the defendant assigns as error that the Court so entered judgment and sentence upon the verdict.

VIII.

The defendant took timely and proper exception to the following instruction:

> "If the defendant Ward is guilty in this case it is upon what he did that day, his conduct in operating the elevator, his relation to the transaction between Hoffman and the agents who bought it, and what, if anything, he said to the operators [38] when they came there for the purpose of purchasing it. He said he did nothing except to operate the elevator as a favor, which he did sometimes. The Government witnesses testified that they asked Ward for some whiskey or some liquor, and he said, 'We haven't that,' and you remember what their testimony was, and if he did actively participate in the operation of the elevator, and carried these parties up and was conscious of what was transpiring, and did it in the advancement of a sale between the parties participating in it, and did use the conversation and statements

that I have indicated, directing or suggesting some other brand instead of that which was demanded, and actually participated in the transaction and closing of the sale, why then he would be guilty of sale, and likewise, of possession. If that was the only connection the defendant Ward had with relation to the matter you would not be warranted in finding the defendant Ward guilty of the nuisance count, because that transaction alone, of itself, would not be sufficient to find the defendant Ward guilty of a nuisance, but would be sufficient to find him guilty of possession and of sale."

IX.

The defendant took proper and timely exception to the following instruction:

> "A person may make a sale and not be in possession, by bringing the parties together, or being a party to bringing the parties together, and at the sale, and participating himself in [39] carrying out the transaction, and not be in the possession of the liquor himself, it being elsewhere in the possession of some other party, he could be a party to a sale and not be in possession."

And as to each and every of said assignments of error, as aforesaid, the defendant says that at the time of making of the order or ruling of the Court complained of, the defendant duly excepted and was allowed an exception wherever the same ap-

pears in the record to the ruling and order of the Court.

JOHN F. DORE,
Attorney for Defendant.

Acceptance of service of within assignments of error acknowledged this 26th day of March, 1923.

THOMAS P. REVELLE,
Attorney for Plaintiff.
By CHARLES P. MORIARTY.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [40]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 7188.

EMIL HOFFMAN, BERNARD SHAW and T. FURIHATA,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

ASSIGNMENTS OF ERROR (T. FURIHATA).

Comes now the defendant, T. Furihata, and in connection with his petition for a writ of error in this cause assigns the following errors which said

defendant avers occurred at the trial thereof, and upon which he relies to reverse the judgment entered herein, as appears of record.

I.

That the Court erred in denying the motion of defendant, T. Furihata, for a directed verdict as to Counts I, II, and III of the information, after the direct evidence and renewed at the conclusion of the Government's case.

II.

The Court erred in denying the motion of defendant, T. Furihata, for a directed verdict on each of the counts of the information at the conclusion of the entire case.

III.

The Court erred in denying the defendant, T. Furihata, his motion for a new trial herein, which motion was made in due time after the jury returned a verdict of guilty on the following grounds:

1. The verdict is contrary to the law and the evidence.

2. There is no evidence to sustain the verdict.

3. Error of law occurring at the trial and duly and regularly excepted to.

IV.

The Court erred in imposing sentence on the said T. Furihata of Count I—$300 fine. Count II—Six Months in King County Jail, Count III—$1000 fine. [41]

V.

That the Court erred in instructing the jury that a person makes a sale when he delivers a commodity,

whether he does it personally or through another, said instruction being as follows:

> "You are instructed that a person makes a sale when upon request he delivers the commodity, which purchase is sought for a compensation and the person may make the sale whether he does it personally or does it through another. In this case the testimony is uncontradicted that the defendant, Furihata, was the proprietor of the hotel. The testimony likewise is that the defendant, Hoffman, was a clerk and employee of the hotel; he had a master key to all of the rooms in which liquor was found. He testified that he had access to the key that locked the rooms in which liquor was, and could have gotten the key if he had been permitted by the officers, to have gotten it for them; but they would not permit him to go out of their sight."

The defendant excepted to this instruction before the jury retired to consider its verdict.

VI.

The Court erred in instructing the jury that the defendant T. Furihata was in possession presumptively of the entire hotel and that he is in law presumed to be in possession of everything in the rooms which are in his exclusive possession, and that the possession of the defendant, Hoffman, of any room would be the possession of the same room by the defendant, Furihata, if the employement of Hoffman by Furihata covered the authority to sell liquor, which instruction was as follows:

"You are instructed that the proprietor Furihata was in possession presumptively of the entire hotel, and he is in law presumed to be in possession of everything in the rooms which are in his exclusive possession. There is testimony before you that the rooms in which the liquor was found were unoccupied, and you will remember the testimony with relation to the examination of the register and the statement of the defendant Hoffman, the clerk, with reference to the occupancy of these rooms; and the condition of the rooms on the inside, as disclosed by the witnesses, as to the evidence of the occupancy, and if these rooms were unoccupied then they would in law be presumed to be in possession of the defendant, Furihata, the owner or proprietor, and he would be in constructive possession of everything in the room. If Furihata was in possession of the liquor in the rooms and the defendant, Hoffman, was in his employ, and he had access to the rooms, then the defendant Hoffman's possession of the rooms would be the possession of Furihata, and authorized and presumed to make such disposition as the testimony convinces you from all the facts and circumstances that the authority of his employment warranted. And if you believe from the testimony and the circumstances surrounding that the employment of Hoffman by Furihata covered the authority to dispense or sell the liquor, and the defendant Hoffman made the sale, as he said he did, then

the sale would otherwise be the sale of Furihata, no matter where he was whether in the city, in Tacoma or Portland, or where he may have been."

and to this instruction defendant excepted before the jury retired to consider its verdict, as follows:

Mr. DORE.—Note the following exception: "The defendants note an exception to that instruction on which the Court told the jury the owner of a hotel is presumptively in possession of the entire hotel, and the law presumes him to be in the exclusive possession of everything found in the hotel. The instruction is erroneous."

And thereupon the Court again instructed the jury upon the question of constructive evidence as follows: [42]

The COURT.—If I used the word "presumption" I will say, where I used the word "presumption," while it may not make any difference, if a person is in constructive possession of everything in a room of which he has exclusive possession.

And to which additional instruction defendant took an exception before the jury retired, as follows:

Mr. DORE.—We note that exception, that does not apply to hotel proprietors; abstractly it is correct, but not applicable to this case; there is no testimony here that anybody had exclusive possession of anything.

The COURT.—Well, the proprietor is in

possession of a room unless some one else is in possession of it.

Mr. DORE.—We wish an exception to that instruction, that a proprietor is in possession of everything in a room that is not occupied by a guest, because he is not in possession of an unoccupied room, unless he has knowledge of what is in it.

The COURT.—The only issue here is liquor. I will say that the testimony shows that the defendant Furihata is the lessee and the proprietor of this hotel, and as such he is in constructive possession of what is in the room, and would be in constructive possession of everything in the room.

Mr. DORE.—I want to note an exception to that instruction,—note an exception that one who is an employee of a hotel can be found guilty of maintaining a nuisance, on the ground that the word "maintenance" in itself carries an implication that it does not concern an employee; one must have some control beyond mere employment.

WHEREFORE, the defendant, T.. Furihata, prays that the judgment of said court be reversed and this cause remanded to the said District Court with directions to dismiss the same and discharge said defendant from custody and exonerate the sureties on his bail bond.

WALTER METZENBAUM,

Attorney for Defendant and Plaintiff in Error, T. Furihata.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [43]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERNARD WARD,

Defendant.

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF BOND (BERNARD WARD).

A writ of error is granted on this 26th day of March, 1923, and it is further ORDERED that, pending the review herein, said defendant Bernard Ward be admitted to bail, and that the amount of the supersedeas bond to be filed by said defendant be the sum of one thousand dollars.

And it is further ORDERED that, upon the said defendant's filing his bond in the aforesaid sum, to be approved by the Clerk of this court, he shall be released from custody, pending the determination of the writ of error herein assigned.

Done in open court this 26th day of March, 1923.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [44]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

T. FURIHATA,

Defendant.

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF BOND (T. FURIHATA).

A writ of error is granted on this 26th day of March, 1923, and it is further ORDERED that, pending the review herein, said defendant T. Furihata be admitted to bail, and that the amount of the supersedeas bond to be filed by said defendant be the sum of $2,500.

And it is further ORDERED that, upon the said defendant's filing his bond in the aforesaid sum, to be approved by the Clerk of this court, he shall be

released from custody, pending the determination of the writ of error herein assigned.

Done in open court this 26th day of March, 1923.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [45]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BERNARD G. WARD,
Defendant.

APPEAL AND BAIL BOND (BERNARD WARD).

BE IT REMEMBERED that, on the 27th day of March, 1923, before me, F. C. Reagan, a notary public in and for the State of Washington, duly commissioned and sworn, came Bernard G. Ward, and acknowledged that he owed to the United States of America the sum of One Thousand Dollars ($1,000.00), deposited on the 27th day of March, 1923, by said Bernard G. Ward with F. M. Harsh-

berger, Clerk of the United States District Court for the Western District of Washington, subject to the following conditions, to wit:

That whereas, the said Bernard G. Ward, the above-named defendant, was on the 26th day of March, 1923, sentenced in the above-entitled cause to be confined for the period of two months in the King County Jail; and, whereas the said defendant has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit; and, whereas the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of One Thousand ($1,000.00) Dollars;

NOW, THEREFORE, if the said defendant, Bernard G. Ward, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made in the premises, and shall render himself amenable to and obey all process issued, or ordered to be issued, by said Appellate Court herein, and [46] shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any

and all orders issued herein by said District Court, and shall, pursuant to any order issued by said District Court, surrender himself, and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with my seal and dated, this 27th day of March, 1923.

BERNARD G. WARD. (Seal)

Subscribed to and acknowledged before me this 27th day of March, 1923.

[Notary Seal] F. C. REAGAN,

Notary Public in and for the State of Washington, Residing at Seattle.

Approved.

EDWARD E. CUSHMAN,
Judge.

O. K. as to form.

C. E. HUGHES,
Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 27, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [47]

In the United States District Court, Western District of Washington, Northern Division.

No. 7188.

EMIL HOFFMAN, BERNARD SHAW and T. FURIHATA,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BOND ON APPEAL (T. FURIHATA).

We, T. Furihata, as principal, Leo C. Jacobson and George Jones, in their sole and separate right, as sureties, jointly and severally acknowledge ourselves to be indebted unto the United States of America in the sum of $2,500, lawful money of the United States, to be levied *of* our goods and chattels, lands and tenements, for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs and executors, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas in the above-entitled cause a writ of error has been issued to the Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence entered herein against T. Furihata, and an order has been entered fixing the amount of his bail bond and for the release of the said T. Furihata upon bail, pending the determination of the said writ of error by the said Appellate Court in said sum of $2,500.

NOW, THEREFORE, if the said T. Furihata, as principal obligor herein, shall appear and surrender himself in the above-entitled court and from time to time thereafter, as may be required, to answer any further proceedings, and shall obey and perform any judgment or order which may be had or rendered in the said cause, and shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth Circuit, and shall not depart from the said District without leave having first been obtained from the Court, then this obligation shall be null and void; otherwise [48] to remain in full force and effect.

IN WITNESS WHEREOF we have hereunto set our hands and seals this 26th day of March, 1923.

T. FURIHATA. (Seal)
G. W. JONES. (Seal)
LEO C. JACOBSON. (Seal)

O. K.—THOS. P. REVELLE,
U. S. Attorney.

Approved.

NETERER,
Judge.

United States of America,
Western District of Washington,
Northern Division,—ss.

I, Leo C. Jacobson, one of the sureties within named and a resident of said District, do solemnly swear that, after paying all just debts and liabilities, I am worth in my sole and separate right the sum of $2,500 in real estate within the jurisdiction of the

above-entitled court and subject to levy, execution and sale.

LEO C. JACOBSON.

Subscribed and sworn to before me this —— day of March, 1923.

[Notary Seal] WALTER METZENBAUM,
Notary Public in and for the State of Washington,
Residing at Seattle.

United States of America,
Western District of Washington,
Northern Division,—ss.

I, George Jones, one of the sureties within named and a resident of said District, do solemnly swear that, after paying all just debts and liabilities, I am worth in my sole and separate right the sum of $2,500 in real estate within the jurisdiction of the above-entitled court and subject to levy, execution and sale.

G. W. JONES.

Subscribed and sworn to before me this —— day of March, 1923.

[Notary Seal] WALTER METZENBAUM,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [49]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7188.

BERNARD WARD,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

ORDER EXTENDING TIME TO AND INCLUDING APRIL 26, 1923, TO FILE BILL OF EXCEPTIONS (BERNARD WARD).

For good cause, it is ORDERED that the time for serving and filing the bill of exceptions in this cause be and the same is hereby extended until April 26, 1923.

Done in open court this 26th day of March, 1923.

JEREMIAH NETERER,

Judge.

O. K.—THOMAS P. REVELLE,

CHARLES P. MORIARTY,

Attorneys for Defendant in Error.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [50]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMIL HOFFMAN, BERNARD SHAW and T. FURIHATA,

Defendants.

ORDER EXTENDING TIME TO AND INCLUDING APRIL 26, 1923, TO FILE BILL OF EXCEPTIONS, (T. FURIHATA).

It is hereby ordered that the time for filing bill of exceptions by T. Furihata, one of the defendants in the above-entitled cause, be and the same is hereby extended to April 26, 1923.

JEREMIAH NETERER,

Judge.

O. K.—THOMAS P. REVELLE,

CHAS. P. MORIARTY.

U. S. Dist. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [51]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERNARD WARD,

Defendant.

ORDER EXTENDING TIME TO AND INCLUDING MAY 23, 1923, TO FILE BILL OF EXCEPTIONS (BERNARD WARD).

For good cause shown, it is ORDERED that the time for serving and filing the bill of exceptions in this cause be and the same hereby is extended until May 23d, 1923.

Done in open court, this 23d day of April, 1923.

JEREMIAH NETERER,

Judge.

O. K.—THOMAS P. REVELLE,

C. P. M.,

Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 23, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [52]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 7188.

EMIL HOFFMAN, BERNARD WARD and T. FURIHATA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

ORDER EXTENDING TIME TO AND INCLUDING MAY 26, 1923, TO FILE BILL OF EXCEPTIONS AND EXTEND TERM (T. FURIHATA).

As to the defendant T. Furihata, for good cause shown IT IS HEREBY ORDERED that the time in which the bill of exceptions in this case may be settled and filed and in which the record in this case may be filed in the Circuit Court of Appeals for the Ninth *District* is hereby extended to and including May 26, 1923.

For the purposes of this cause this term of the United States District Court for the Western District of Washington, Northern Division, is hereby extended for thirty days.

EDWARD E. CUSHMAN,

Judge.

O. K.—THOMAS P. REVELLE,

CHARLES P. MORIARTY.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [53]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMIL HOFFMAN, BERNARD WARD and T. FURIHATA,

Defendants.

ORDER RE BILL OF EXCEPTIONS AND EXTENDING TIME TO AND INCLUDING JUNE 25, 1923, TO FILE RECORD.

Upon reading and filing the stipulation of the parties to the above-entitled action, IT IS ORDERED that the bill of exceptions heretofore served and filed herein on behalf of the defendant Bernard Ward be and it is hereby accepted and considered as the bill of exceptions of the defendant, T. Furihata, and that when settled shall be so considered and accepted, and it is further ordered that the time for filing the record herein with the Clerk of the Circuit Court of Appeals of the United

States, Ninth Circuit, shall be and it is hereby extended to and including the 25th day of June, 1923.

Dated this 26th day of May, 1923.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [54]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EMIL HOFFMAN, BERNARD WARD and T. FURIHATA,
Defendants.

ORDER EXTENDING TIME TO AND INCLUDING JULY 31, 1923, TO FILE RECORD (T. FURIHATA).

For good cause shown, IT IS HEREBY ORDERED that the time for settling the bill of exceptions and for filing the record as to the defendants T. Furihata in the Circuit Court of Appeals

for the Ninth *District* be and the same is hereby extended to and including July 31st, 1923.

JEREMIAH NETERER,
Judge.

O. K.—THOMAS P. REVELLE.
CHARLES P. MORIARTY,
Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 2, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [55]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BERNARD WARD,
Defendant.

ORDER EXTENDING TIME TO AND INCLUDING AUGUST 15, 1923, TO FILE RECORD (BERNARD WARD).

For good cause shown, it is ORDERED that the time for filing the record in the above-entitled cause be and the same hereby is extended to the 15th day of August, 1923.

Done in open court this 6th day of July, 1923.

EDWARD E. CUSHMAN,
Judge.

O. K.—THOMAS P. REVELLE,
U. S. Atty.

C. P. MORIARTY,
Attorney for Defendant in Error.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 6, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [56]

United States District Court, Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

T. FURIHATA,
Defendant.

ORDER EXTENDING TIME TO AND INCLUDING AUGUST 25, 1923, TO FILE RECORD (T. FURIHATA).

For good cause shown IT IS HEREBY ORDERED that the time for filing the record in the Circuit Court of Appeals for the Ninth *District* be

and the same is hereby extended to and including August 25, 1923.

JEREMIAH NETERER,
Judge.

O. K.—THOMAS P. REVELLE.
CHARLES P. MORIARTY,
Spec. Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 30, 1923. F. M. Harshberger, Clerk. [57]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 7188.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BERNARD WARD and T. FURIHATA,
Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please make up the transcript on appeal of the above-entitled cause for printing the record thereof for the Ninth Circuit Court of Appeals at San Francisco:

Information.

Plea.

Verdict.

Motion for new trial.
Order overruling motion for new trial.
Bond.
Bill of exceptions and order settling bill of exceptions.
Petition for writ of error.
Assignment of errors.
Allowance of writ of error.
Writ of error.
Citation on writ of error.
Orders extending time for filing record.

WALTER METZENBAUM,
Attorney for T. Furihata.
JOHN F. DORE,
Attorney for B. Ward.

Received: Office of U. S. Attorney, Jul. 21, 1923, Seattle, Wash. Ref. to C. P. Moriarty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 21, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [58]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7188.

BERNARD WARD and T. FURIHATA,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

STIPULATION RE PRINTING TRANSCRIPT OF RECORD.

It is stipulated and agreed by and between the above-named parties of the above-entitled cause that only one record be certified herein and only one transcript of record be printed; that is, that the plaintiffs in error above named may unite in having the record prepared, certified and filed and in having the transcript thereof printed in accordance with the rules of the above-entitled court, and that said record and said printed transcript shall have the same force and effect in support of the separate appeals of the two plaintiffs in error as if separately certified and separately printed.

Dated this 19 day of July, 1923.

JOHN F. DORE,
Attorney for Bernard Ward, Plaintiff in Error.

WALTER METZENBAUM,
Attorney for T. Furihata, Plaintiff in Error.

THOMAS P. REVELLE,
Attorney for Defendant in Error.

Received: office of U. S. Attorney, Jul. 21, 1923, Seattle, Wash. Ref. to C. P. Moriarty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 21, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [59]

In the United States District Court for the Western District of Washington Northern Division.

No. 7188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERNARD WARD and T. FURIHATA,

Defendants.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 59, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and

charges incurred and paid in my office by or on behalf of the plaintiffs in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 139 folios at 15¢..........................$20.85
[60]

Certificate of Clerk to transcript of record, 4 folios at 15¢.......................... .60

Seal to said certificate...................... .20

I hereby certify that the above cost for preparing and certifying record, amounting to $21.65, has been paid to me by attorneys for plaintiffs in error.

I further certify that I hereto attach and herewith transmit the original writs of error and the original citations issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 17th day of August, 1923.

[Seal] F. M. HARSHBERGER,

Clerk United States District Court, Western District of Washington. [61]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7188.

BERNARD WARD,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

WRIT OF ERROR (BERNARD WARD).

United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before the Honorable Jeremiah Neterer, one of you, between Bernard Ward, the plaintiff in error, and the United States of America, the defendant in error, a manifest error happened to the prejudice and great damage of the said plaintiff in error, as by his complaint and petition herein appears, and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United States

Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of [62] California, together with this writ, so that you have the same at the said city of San Francisco within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 26th day of March, A. D. 1923, and of the Independence of the United States the one hundred and forty-seventh.

[Seal] F. M. HARSHBERGER,

Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

Service of the within and foregoing writ of error and receipt of a copy thereof is hereby admitted this 26th day of March, 1923.

THOMAS P. REVELLE,

United States District Attorney for the Western District of Washington, Northern Division.

By CHARLES P. MORIARTY.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [63]

In the United States District Court, Western District of Washington, Northern Division.

No. 7188.

EMIL HOFFMAN, BERNARD SHAW and T. FURIHATA,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

WRIT OF ERROR (T. FURIHATA).

The United States of America,—ss.

The President of the United States of America, to the Hon. JEREMIAH NETERER, Judge of the District Court of the Western District of Washington, Northern Division, and to said Court, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment and sentence in the District Court of the United States for the Western District of Washington, Northern Division, in a case pending therein, wherein the United States of America was plaintiff and T. Furihata, is defendant in error, a manifest error happened and occurred to the damage of the said T. Furihata, the above-named plaintiff in error, as by his petition and complaint doth appear, and we being willing that error, if any there hath been, should be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command that you,

under your seal, *you* send the record and proceedings aforesaid, with all things concerning the same and pertaining thereto, to the U. S. Circuit Court of Appeals to be then and there held and the records and proceedings aforesaid being inspected, the said United *States Court* of Appeals may cause further to be done therein to correct the error, what of right and according to law and the custom of the United States should be done.

WITNESS the Hon. WILLIAM HOWARD TAFT, Chief Justice of the United States, this 26th day of March, 1923.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [64]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7188.

BERNARD WARD,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

CITATION ON WRIT OF ERROR (BERNARD WARD).

United States of America,—ss.

The President of the United States of America, to the United States of America, and to THOMAS P. REVELLE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said Bernard Ward is plaintiff in error and the United States of America is defendant in error, to show cause, if any there *by,* why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the [65] District Court of the United States for the Western District of Washington, Northern Division, this 26th day of March, 1923.

JEREMIAH NETERER,
United States District Judge.

[Seal] Attest: F. M. HARSHBERGER,
Clerk of the District Court of the United States for the Western District of Washington, Northern Division.

Service of the within citation and receipt of a copy thereof is hereby admitted, this 26th day of March, 1923.

THOMAS P. REVELLE,
United States Attorney for the Western District of Washington.
By CHARLES P. MORIARTY.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [66]

In the United States District Court, Western District of Washington, Northern Division.

No. 7188.

EMIL HOFFMAN, BERNARD SHAW and T. FURIHATA,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

CITATION ON WRIT OF ERROR (T. FURIHATA).

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear in a session of the U. S. Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, within

thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein T. Furihata is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against T. Furihata, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS the Hon. JEREMIAH NETERER, Judge of the District Court of the United States, for the Western District of Washington, this 24th day of March, 1923.

[Seal] JEREMIAH NETERER,

Judge.

Service accepted March 26th, 1923.

THOMAS P. REVELLE.

CHARLES P. MORIARTY,

Asst. U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [67]

[Endorsed]: No. 4392. United States Circuit Court of Appeals for the Ninth Circuit. Bernard Ward and T. Furihata, Plaintiffs in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the

United States District Court of the Western District of Washington, Northern Division.

Received August 24, 1923.

F. D. MONCKTON,
Clerk.

Filed November 7, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4392

UNITED STATES OF AMERICA,
Defendant-in-Error.

vs.

BERNARD WARD and T. FURIHATA,
Plaintiffs-in-Error.

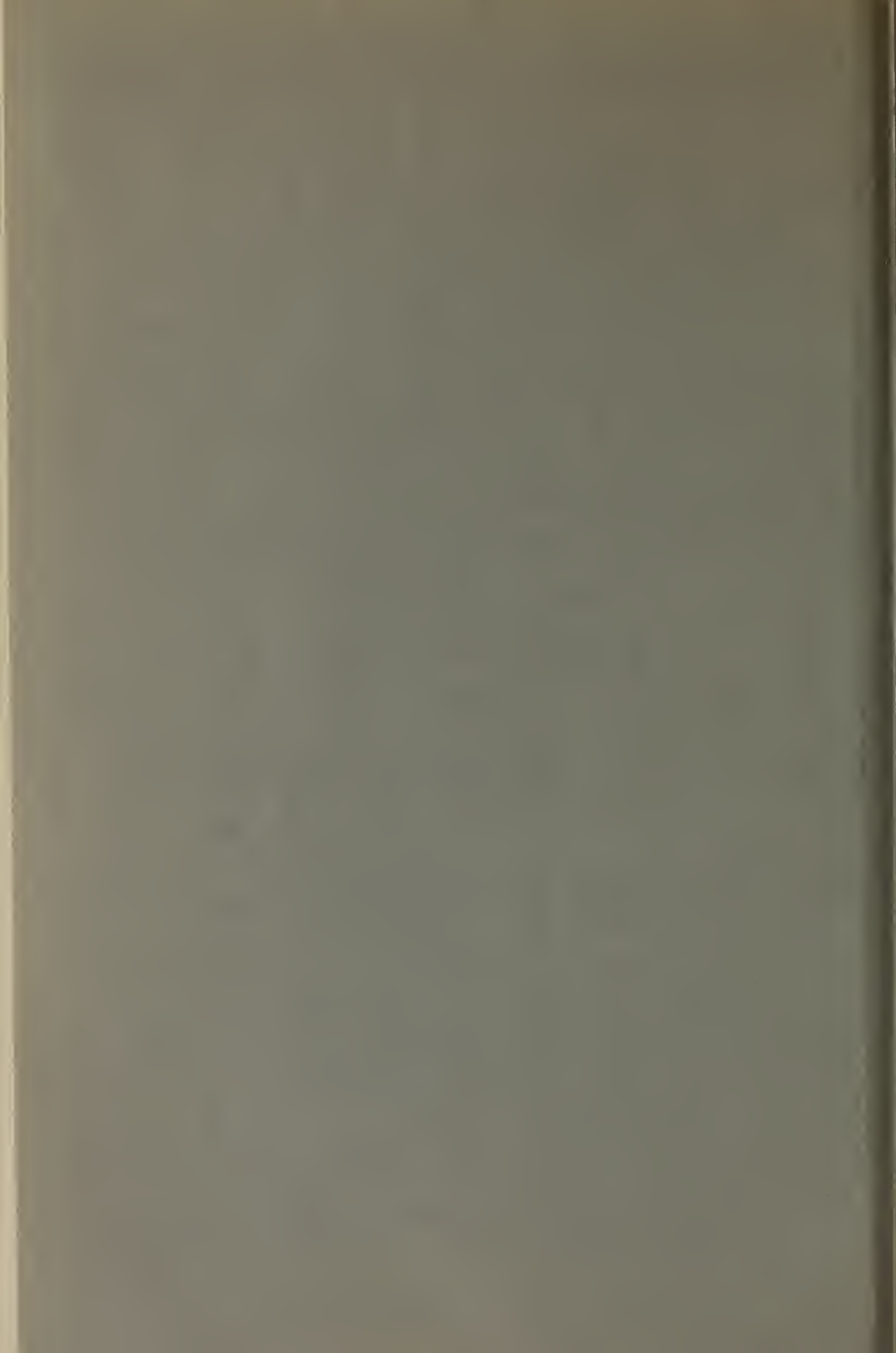
WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

BRIEF OF T. FURIHATA,
Plaintiff-in-Error.

WALTER METZENBAUM,
Attorney for Plaintiff-in-Error,
Seattle, Washington.

FILED
FEB 13 1925
F. D. MONCKTON,
CLERK



United States Circuit Court of Appeals

For the Ninth Circuit

No. 4392

UNITED STATES OF AMERICA,

Defendant-in-Error.

vs.

BERNARD WARD and T. FURIHATA,

Plaintiffs-in-Error.

STATEMENT OF THE CASE.

An information was filed in the lower court charging the plaintiff-in-error, T. Furihata, and two others, Emil Hoffman and Bernard Ward, with several violations of the National Prohibition Act. The information contained three counts. In count one the defendants were charged with the unlawful possession of intoxicating liquor. In count two they were charged with the unlawful sale of intoxicating liquor. In count three they were charged with maintaining a common nuisance. (Trans. p. 2.)

When arrainged each of the defendants pleaded "Not Guilty" to each of the counts in the information. (Trans. p 6.)

At the trial evidence was introduced which tended to show that the plaintiff-in-error was the lessee of the New Avon Hotel in the City of Seattle, a large hotel situated in the center of the city and containing over a hundred rooms. That the defendant, Emil Hoffman, was employed by the plaintiff-in-error as a clerk in the hotel.

On the 17th day of August, 1922, about the hour of 3:00 o'clock in the afternoon a prohibition agent named O'Hara went to the hotel office on the street floor and solicited the purchase of a drink of whiskey from the defendant, Hoffman. That thereupon Hoffman by way of the elevator took him to the sixth floor of the hotel to room No. 606, a room which was exclusively occupied by the defendant, Hoffman, as his residence, and there sold him a drink of whiskey. That thereafter on the same day about 4:30 o'clock in the afternoon, the agent again visited the hotel and succeeded in buying two bottles of whiskey from the defendant, Hoffman. That plaintiff-in-error was not present or in the hotel at the times when the drink of liquor and the two bottles of liquor were sold to the Government agents.

In addition to the liquor purchased, the Government agents, acting under a search warrant for

the premises found some liquor concealed in several other guest rooms.

No proof was offered of any sales of liquor other than the two mentioned herein and no attempt was made to prove that the hotel had a previous bad reputation.

At the close of the Government's case in-chief, a motion for a directed verdict of acquittal was interposed on behalf of the plaintiff-in-error, based on the ground that the evidence failed to connect him with the possession of intoxicating liquor, or with the two sales thereof, or with the maintenance of a common nuisance, which motion after argument was denied and exception allowed. The Trial Judge, however, suggested that it could be interposed again at the close of the entire case. (Trans. p. 18.)

Upon behalf of the plaintiff-in-error it was shown that the defendant, Hoffman, had been employed by the plaintiff-in-error as the hotel clerk for a short time prior to the visit of the Government agents, that the first sale was made in his own room from a bottle of liquor belonging to him personally and that the second sale was made from a supply belonging to another guest in the hotel, who was a friend of the clerk; that the plaintiff-in-error

did not authorize, assent to or know of the sale or of the presence of the liquor on the premises. That the clerk was acting surreptitiously in his own interest and for his own profit and without the knowledge or connivance of the proprietor of the hotel, plaintiff-in-error.

No rebuttal testimony was offered by the Government, and thereupon, the motion for a directed verdict of acquittal as to each count in the information was again interposed because of the insufficiency of the evidence. This motion after argument was denied and an exception allowed. (Trans. p. 24.)

In the course of his instructions the Trial Judge instructed the jury as follows:

> "You are instructed that a person makes a sale when upon request he delivers the commodity, which purchase is sought for a compensation and the person may make the sale whether he does it personally or does it through another. In this case the testimony is uncontradicted that the defendant, Furihata, was the proprietor of the hotel. The testimony likewise is that the defendant, Hoffman, was a clerk and employee of the hotel; he had a master key to all of the rooms in which liquor was found. He testified that he had access to the key that locked the rooms in which liquor was, and could have gotten the key if he had been permitted by the officers—have gone and gotten it for them; but they would not permit him to go out of their sight."
>
> "You are instructed that the proprietor,

Furihata, was in possession presumptively of the entire hotel, and he is in law presumed to be in possession of everything in the rooms which are in his exclusive possession. There is testimony before you that the rooms in which the liquor was found were unoccupied, and you will remember the testimony with relation to the examination of the register and the statement of the defendant, Hoffman, the clerk, with reference to the occupancy of these rooms; and the condition of the rooms on the inside, as disclosed by the witnesses, as to the evidence of the occupancy, and if these rooms were unoccupied then they would in law be presumed to be in possession of the defendant, Furihata, the owner or proprietor, and he would be in constructive possession of everything in the room. If Furihata was in possession of the liquor in the rooms and the defendant, Hoffman, was in his employ, and he had access to the rooms, then the defendant Hoffman's possession of the rooms would be the possession of Furihata, and authorized and presumed to make such disposition as the testimony convinces you from all the facts and circumstances that the authority of his employment warranted. And if you believe from the testimony and the circumstances surrounding that the employment of Hoffman by Furihata, covered the authority to dispense or sell the liquor, and the defendant, Hoffman, made the sale, as he said he did, then the sale would otherwise be the sale of Furihata, no matter where he was, whether in the city, in Tacoma or Portland, or where he may have been."

To these instructions timely exceptions were taken and the following colloquy had between the

trial judge and the attorney for the plaintiff-in-error:

> Mr. Dore: "Note the following exception: The defendants note an exception to that instruction on which the court told the jury the owner of a hotel is presumptively in possession of the entire hotel, and the law presumes him to be in the exclusive possession of everything found in the hotel. The instruction is erroneous."

And thereupon the court again instructed the jury upon the question of constructive possession as follows:

> The Court: "If I used the word 'Presumption,' I will say, where I used the word 'presumption,' while it may not make any difference, if a person is in constructive possession of everything in a room of which he has exclusive possession."

And to which additional instruction defendant took an exception before the jury retired, as follows:

> Mr. Dore: We note that exception, that does not apply to hotel proprietors; abstractedly, it is correct, but not applicable to this case; there is no testimony here that anybody had exclusive possession of anything.
>
> The Court: Well, the proprietor is in possession of a room unless someone else is in possession of it.
>
> Mr. Dore: We wish an exception to that instruction, that a proprietor is in possession of everything in a room that is not occupied by a guest, because he is not in possession of

an unoccupied room, unless he has knowledge of what is in it.

The Court: The only issue here is liquor. I will say that the testimony shows that the defendant, Furihata, is the lessee and the proprietor of this hotel, and as such he is in constructive possession of what is in the room, and would be in constructive possession of everything in the room.

Mr. Dore: I want to note an exception to that instruction—note an exception that one who is an employee of a hotel can be found guilty of maintaining a nuisance, on the ground that the word "maintenance" in itself carries an implication that it does not concern an employee; one must have some control beyond mere employment. (Trans. pp. 24-34.)

Thereupon the jury retired and after deliberation returned a verdict finding the plaintiff-in-error guilty of each count in the information. (Trans. p. 8.)

Motion for a new trial was duly interposed on the following grounds:

1. That the verdict was contrary to the law and to the evidence.

2. That there was no evidence to sustain the verdict.

3. Error of law occurring at the trial and duly and regularly excepted to.

This motion, after argument, was denied and an exception allowed. (Trans. pp. 9-10.)

Thereafter the Court sentenced the plaintiff-in-error to six months imprisonment and a fine of $1,000 on Count II and a fine of $300 on Count I. (Trans. p. 12.)

ASSIGNMENT OF ERRORS.

Comes now the defendant, T. FURIHATA, and in connection with his petition for a writ of error in this cause, assigns the following errors which said defendant avers occurred at the trial thereof, and upon which he relies to reverse the judgment entered herein, as appears of record.

I.

That the court erred in denying the motion of defendant, T. Furihata, for a directed verdict as to Counts I, II and III of the information, after the direct evidence, and renewed at the conclusion of the Government's case.

II.

The court erred in denying the defendant, T. Furihata, his motion for a new trial herein, which motion was made in due time after the jury returned a verdict of guilty on the following grounds:

1. The verdict is contrary to the law and the evidence.

2. There is no evidence to sustain the verdict.

3. Error of law occurring at the trial and duly and regularly excepted to.

IV.

The court erred in imposing sentence on the said T. Furihata of six months imprisonment and $1,000 fine on Count II and a fine of $300 on Count I.

V.

That the court erred in instructing the jury that a person makes a sale when he delivers a commodity, whether he does it personally or through another, said instruction being as follows:

> "You are instructed that a person makes a sale when upon request he delivers the commodity, which purchase is sought for a compensation and the person may make the sale whether he does it personally or does it through another. In this case the testimony is uncontradicted that the defendant, Furihata, was the proprietor of the hotel. The testimony likewise is that the defendant, Hoffman, was a clerk and employee of the hotel; he had a master key to all of the rooms in which liquor was found. He testified that he had access to the key that locked the rooms in which liquor was, and could have gotten the key if he had been permitted by the officers—have gone and gotten it for them, but they would not permit him to go out of their sight."

The defendant excepted to this instruction before the jury retired to consider its verdict.

VI.

The court erred in instructing the jury that the defendant T. Furihata was in possession presumptively of the entire hotel and that he is in law presumed to be in possession of everything in the rooms which are in his exclusive possession, and that the possession of the defendant, Hoffman, of any room would be the possession of the same room by the defendant, Furihata, if the employment of Hoffman by Furihata covered the authority to sell liquor, which instruction was as follows:

> "You are instructed that the proprietor, Furihata, was in possession presumptively of the entire hotel, and he is in law presumed to be in possession of everything in the rooms which are in his exclusive possession. There is testimony before you that the rooms in which the liquor was found were unoccupied, and you will remember the testimony with relation to the examination of the register and the statement of the defendant Hoffman, the clerk, with reference to the occupancy of these rooms; and the condition of the rooms on the inside, as disclosed by the witnesses, as to the evidence of the occupancy, and if these rooms were unoccupied then they would in law be presumed to be in possession of the defendant, Furihata, the owner or proprietor, and he would be in constructive possession of everything in the room. If Furihata was in possession of the liquor in the rooms and the defendant, Hoffman, was in his employ, and he had access to the rooms, then the defendant Hoffman's possession of the rooms would be the

possession of Furihata, and authorized and presumed to make such disposition as the testimony convinces you from all the facts and circumstances that the authority of his employment warranted. And if you believe from the testimony and the circumstances surrounding that the employment of Hoffman by Furihata covered the authority to dispense or sell the liquor, and the defendant Hoffman made the sale, as he said he did, then the sale would otherwise be the sale of Furihata, no matter where he was, whether in the city, in Tacoma or Portland, or where he may have been."

and to this instruction defendant excepted before the jury retired to consider its verdict, as follows:

Mr. Dore: Note the following exception: The defendants note an exception to that instruction on which the court told the jury the owner of a hotel is presumptively in possession of the entire hotel, and the law presumes him to be in the exclusive possession of everything found in the hotel. The instruction is erroneous.

And thereupon the court again instructed the jury upon the question of constructive evidence as follows:

The Court: If I used the word "presumption" I will say, where I used the word "presumption," while it may not make any difference, if a person is in constructive possession of everything in a room of which he has exclusive possession.

And to which additional instruction defendant took an exception before the jury retired, as follows:

Mr. Dore: We note that exception, that

does not apply to hotel proprietors; abstractedly, it is correct, but not applicable to this case; there is no testimony here that anybody had exclusive possession of anything.

The Court: Well, the proprietor is in possession of a room unless someone else is in possession of it.

Mr. Dore: We wish an exception to that instruction, that a proprietor is in possession of everything in a room that is not occupied by a guest, because he is not in possession of an unoccupied room, unless he has knowledge of what is in it.

The Court: The only issue here is liquor. I will say that the testimony shows that the defendant Furihata is the lessee and the proprietor of this hotel, and as such he is in constructive possession of what is in the room, and would be in constructive possession of everything in the room.

Mr. Dore: I want to note an exception to that instruction—note an exception that one who is an employee of a hotel can be found guilty of maintaining a nuisance, on the ground that the word "maintenance" in itself carries an implication that it does not concern an employee; one must have some control beyond mere employment.

ARGUMENT.

The motion for a directed verdict of acquittal interposed by the plaintiff-in-error at the close of the Government's case-in-chief directed to each of

the three counts in the Information should have been granted.

At that time it appeared from the evidence that the liquor found in several guest rooms of the hotel was carefully secreted, so that it could not be readily seen or discovered, and that the two sales to the Government agents were made by the clerk in charge of the hotel in the absence of the plaintiff-in-error and under circumstances which established beyond any question that these sales were made without the knowledge, assent or connivance of the plaintiff-in-error.

Plaintiff-in-error is a Japanese and the conduct and management of the hotel was left to his employees, the day and night clerks. The business of the plaintiff-in-error was a legitimate and lawful one and he could not be held criminally responsible for any unlawful act or acts done by his employees without his knowledge, assent or connivance for the reason that such unlawful acts were entirely without the scope of their employment. The general rule is well stated in

> *Hiff vs. State,* 5 Blackf. 149 (33 Am. Decisions 463);

and in

Woolen & Thornton on Intoxicating Liquors,
Sec. 805,

as follows:

> "The general rule is that a master is liable in a civil suit for the negligence or unskillful acts of his servant when he is acting in the employment of his master; but that he is not subject to be punished by indictment for the offenses of his servant unless they were committed by his command or with his assent,"

and also in *Lauer vs. State,* 24 Ind. 131, and *Woolen & Thornton on Intoxicating Liquors,* Sec. 805, as follows:

> "We must not hold men responsible for crimes committed by others without some proof that they either procured, consented or advised in their perpetration. We know full well that in this class of cases the guilty may sometimes escape for the failure of this proof and that it may sometimes be impossible to produce it in cases where it exists, but these considerations are also applicable to every other class of crimes."

It is generally held by the authorities that the owner or proprietor of a hotel is not regarded as being in possession of, and is not responsible criminally for intoxicating liquor found in the guest rooms of the hotel unless he had knowledge of its presence there.

Harris vs. State, 111 SE. Rep. 886, (Ga.);
Tunner vs. State, 185 Pac. 1104, (Okla);

Everman vs. Commonwealth, 248 S. W. Rep. 485 (Ky.).

It has also been held repeatedly by courts of last resort that sales of intoxicating liquor by employees of a hotel company, or a hotel proprietor, such as clerks, waiters and bell-boys, are not chargeable to the company or the proprietor in the absence of evidence showing participation or connivance and that knowledge on the part of the one accused of aiding or abetting a violation of the law prohibiting the possession or sale of intoxicating liquor is an indispensable element of a provable case.

Everman vs. Commonwealth, 248 SW. Rep. 485, (Ky.);

Barber vs. Kirkwood Hotel Co., 151 NW. Rep. 446, (Iowa);

State vs. Crawford, 132 SW. Rep. 43, (Mo.);

State vs. Ford, 219 SW. Rep. 702, (Mo.);

Commonwealth vs. Riley, 81 NE. Rep. 881, (Mass.);

Commonwealth vs. Riley, 10 L. R. A. (N. C.), 1122.

In discussing this question, it was said in the case of *Everman vs. Commonwealth, supra,* that

"Appellant was engaged in the hotel business. Her house was a place of public entertainment, and, while we do not hold in such circumstances that it was necessary for the Common-

> wealth to prove the appellant actually saw the liquor and aided in concealing or keeping it, we do think that it was necessary to show facts and circumstances from which it could be reasonably inferred that she knowingly aided or assisted in unlawfully acquiring, retaining or concealing it."

In the present case the evidence introduced on behalf of the Government established affirmatively that the plaintiff-in-error was not present when the two sales were made and that they were made by the clerk of the hotel in a secretive and surreptitious manner, and that the liquor found in the several guest rooms was secreted in such a way that it could not be discovered except as a result of a diligent, thorough and painstaking search. So much for that part of the motion as was directed to the first and second counts of the information.

The third count charged the plaintiff-in-error with the maintenance of a common nuisance. In the first place the evidence adduced in support of the Government's case in chief failed to establish that the hotel in question was being maintained or conducted as a common nuisance. Something more must be shown than a single sale or two separate sales of intoxicating liquor on the same afternoon to prove that a hotel is being conducted in such a way as to be a common nuisance to the general public.

Murphy vs. United States, 289 Fed. Rep. 780;
Baker vs. United States, 289 Fed. Rep. 249.

If, in fact, a hotel or other place is being conducted as a common nuisance, that fact is easily susceptible of proof. It may be shown by proof of habitual sales of intoxicating liquor; it may be shown by the class, character and condition as to sobriety of the persons who frequent it; it may be shown by proof of its general public reputation, and it may be shown by boisterous and disorderly conduct of the persons who frequent it. No attempt was made to prove such facts or any of them in the present case. Nothing, whatever, was shown except two sales during the same afternoon and the finding of some liquor secreted in several guest rooms of the hotel. This was clearly insufficient to establish that the hotel in question was a common nuisance.

In the second place, all that has been said in reference to Count I and II of the Information is applicable to the nuisance count. If the plaintiff-in-error was absent when the sales were made and did not know of or assent to these sales being made and did not know of the presence of the secreted liquor in the several guest rooms, he could not be held criminally responsible for maintaining a common nuisance.

In the course of his instructions the Trial Judge instructed the jury that a hotel proprietor, whether the hotel be one of ten rooms or of two hundred, is constructively in possession of everything found in the hotel and if intoxicating liquor is sold upon the premises by any one of his employes, whether that employee be a clerk, waiter, bell-boy or janitor, he is presumed to have authorized it and is criminally liable therefor. These instructions were erroneous and misled the jury to the prejudice of the plaintiff-in-error. The instruction as to the constructive possession leaves out the most essential element, that of knowledge. To hold a hotel proprietor criminally responsible for the possession of intoxicating liquor found in the guest rooms of the hotel, it must be shown that he actually knew of its presence or knew of the facts and circumstances sufficient of themselves to charge him with knowledge. The evidence as a whole shows that he did not know that there was any liquor in the hotel and the circumstances, such as the manner in which it was concealed and the places where it was concealed negative the idea that the facts and circumstances charged him with notice.

The instruction on the subject of presumption is equally erroneous. The hotel business is a lawful and legitimate business and the proprietor of a hotel is

not chargeable criminally with the criminal acts of his employees committed without the scope of their employment and in the commission of which he did not participate, connive, assist or assent to. But even conceding that such a preposterous rule exists it could have no application to the present case for the reason that it was proven by the uncontradicted testimony of the clerk that the two sales in question were made by him secretively in the absence of the plaintiff-in-error and without his knowledge or consent, and that the liquor found in the guest rooms was secreted by him for his own use and without the knowledge or consent of the plaintiff-in-error.

No rule is more firmly imbedded and established in the law than that presumptions of law exist only in the absence of actual evidence and that when actual or positive evidence is introduced upon a given or material fact in issue all presumptions of law *ipso facto* cease to exist. It is for this reason we contend that the motion for a directed verdict of acquittal at the close of the enire case should have been granted, and the failure of the Trial Judge to grant this motion is a reversible error.

We respectfully submit that this cause should be reversed and remanded to the lower court with

directions to dismiss the same and discharge the plaintiff-in-error from custody.

WALTER METZENBAUM,

Attorney for Plaintiff-in-Error,
T. Furihata.

No. 4392. 10

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

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Plaintiffs-in-Error,

vs.

UNITED STATES OF AMERICA,

Defendant-in-Error.

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BRIEF OF PLAINTIFF-IN-ERROR BERNARD WARD.

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STATEMENT.

The plaintiff-in-error, Bernard Ward (named in the information as Bernard Shaw), together with one Emil Hoffman and T. Furihata, was tried on an information containing three counts.

In the first count it was charged that "said defendants did then and there knowingly, wilfully and unlawfully have and possess certain intoxicating liquor, to-wit: 27 bottles each containing one-fifth gallon of a certain liquor known as whisky, 13 pints of a certain liquor known as whisky, 60 pints of a certain liquor known as distilled spirits, 17 quarts of a certain liquor known as beer, and 4 bottles each containing one-fifth gallon of a certain liquor known as gin, * * * then and there containing more than one-half of one per cent of alcohol by volume, and then and there fit for use for beverage purposes, * * * intended then and there by said Emil Hoffman, Bernard Shaw (Ward) and T. Furihata for use in violating * * * the National Prohibition Act, by selling, bartering, exchanging, giving away and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said Emil Hoffman, Bernard

Shaw (Ward) and T. Furihata, as aforesaid, was then and there unlawful and prohibited by * * * the National Prohibition Act."

In the second count all of the defendants were charged with the sale, on the 17th day of August, 1922, of two bottles each containing one-fifth gallon of a certain liquor known as whisky.

In the third count all of the defendants were charged with maintaining on the 17th day of August, 1922, at 608 Second Avenue, Seattle, Washington, a common nuisance.

After a trial by jury the defendant Bernard Ward was found not guilty on Count I, guilty on Count II, and not guilty on Count III. In other words, the jury found by their verdict that the said defendant did not possess the two bottles of whisky on August 17, 1922, that he soild, which was described in Count I of the indictment and included in the 27 bottles "each containing one-fifth gallon of a certain liquor known as whisky."

ASSIGNMENTS OF ERROR.

I.

The court erred in overruling the motion for new trial herein.

II.

The court erred in overruling the motion in arrest of judgment herein.

III.

The court erred in failing to set aside the verdict rendered in this cause, for the reason that the same is inconsistent in that the defendant was by the verdict found guilty of selling liquor which the jury found by their verdict that he did not possess with intent to sell.

IV.

Thereafter, and within the time limited by law and the order and rules of this court, said defendant moved for a new trial, which said motion was overruled by the court, and an exception allowed, which ruling of the court the defendant now assigns as error.

V.

Thereafter, and within the time limited by law, the defendant moved the court that judgment and sentence upon the verdict rendered in the above-entitled cause be arrested and stayed, which motion was overruled by the court and an exception allowed

the defendant, and the defendant now assigns as error the overruling of said motion.

VI.

The court erred in overruling the motion in arrest of judgment entered herein.

VII.

The court thereafter entered judgment and sentence against said defendant, upon the verdict of guilty rendered upon said indictment, to which ruling and judgment and sentence the defendant excepted, and now the defendant assigns as error that the court so entered judgment and sentence upon the verdict.

VIII.

The defendant took timely and proper exception to the following instruction:

> "If the defendant Ward is guilty in this case it is upon which he did that day, his conduct in operating the elevator, his relation to the transaction between Hoffman and the agents who bought it, and what, if anything, he said to the operators when they came there for the purpose of purchasing it. He said he did nothing except to operate the elevator as a favor, which he did sometimes. The Government witnesses testified that they asked Ward for some whiskey or some liquor, and he said,

'We haven't that,' and you remember what their testimony was, and if he did actively participate in the operation of the elevator, and carried these parties up and was conscious of what was transpiring, and did it in the advancement of a sale between the parties participating in it, and did use the conversation and statements that I have indicated, directing or suggesting some other brand instead of that which was demanded, and actually participated in the transaction and closing of the sale, why then he would be guilty of sale, and likewise, of possession. If that was the only connection the defendant Ward had with relation to the matter you would not be warranted in finding the defendant Ward guilty of the nuisance count, because that transaction alone, of itself, would not be sufficient to find the defendant Ward guilty of a nuisance, but would be sufficient to find him guilty of possession and of sale."

IX.

The defendant took proper and timely exception to the following instruction:

> "A person may make a sale and not be in possession, by bringing the parties together, or being a party to bringing the parties together, and at the sale, and participating himself in carrying out the transaction, and not be in the possession of the liquor himself, it being elsewhere in the possession of some other party, he could be a party to a sale and not be in possession."

ARGUMENT.

Gordon B. O'Hara, a witness for the Government, testified that he was a federal prohibition agent on August 17, 1922; that he went to the New Avon Hotel, 608 Second Avenue, Seattle, Washington; that the defendant Hoffman was at the desk; that he asked him if he could get a drink of whiskey; that Hoffman took him to room 606, served him a drink, for which he paid fifty cents. He further testified that he went back to the prohibition office and secured a search warrant and, with Agent Justi, went to the hotel about 4:30; that Hoffman came down in the elevator; that he told Hoffman he wanted to get some liquor; that Ward was sitting in the lobby, reading a paper; that Hoffman got in the elevator and, as it was starting up, called to Ward to get in the elevator; that the witness and Justi got out of the elevator on the second floor and the elevator "went upstairs"; that in three or four minutes Ward met them on the second floor and told them to go into the parlor, room 204; that Hoffman returned shortly with Exhibits 1 and 2, for which the witness handed Hoffman $20 in marked money. Hoffman was then arrested. He testified that Ward was not present when the

whiskey was delivered; that later on he saw Ward standing in the lobby of the hotel, where he arrested him; that Ward denied ownership of the liquor.

On cross-examination O'Hara testified that Hoffman was the hotel clerk and that he knew that Ward was manager of the Rainier Taxicab Company, which had a switchboard and office in the hotel building (Tr. 16-7).

Walter M. Justi, a Government witness, testified that he went to the New Avon Hotel with O'Hara; that Ward was sitting in the lobby when he and O'Hara stepped in the elevator; that Hoffman was the operator; that he called to Ward; that Hoffman took O'Hara and the witness up to the second floor; that O'Hara told him he wanted some whiskey; that the witness and O'Hara got out on the second floor and Hoffman operated the elevator to some upper floor; that Ward later saw them on the second floor and told them to go into room 204, where Hoffman came in and handed O'Hara two bottles; that O'Hara handed Hoffman $20 and the witness arrested him; that Ward was not present at the time of the sale (Tr. 17-8).

Motion for a directed verdict on each count, on behalf of the defendant Ward, was made at the close of the Government's case. The motion was denied as to each count and an exception was allowed (Tr. 19).

The plaintiff-in-error Ward testified that he was the manager of the Rainier Taxicab Company, which had an office in the lobby of the New Avon Hotel; that said company had approximately thirty drivers; that on the day in question he was operating the switchboard over which calls were received for cabs and reports from the drivers; that the hotel is a small one and the clerk acts as operator of the elevator and bell boy; that it is customary for employees of the cab company to help out on the elevator when the clerk is "rooming" guests; that when the clerk takes guests up to their rooms the employees of the cab company would run the elevator for the convenience of other guests; that the witness had done it thousands of times; that he had no connection in any way with the hotel; that on the day in question he was standing at the switchboard, reading a newspaper; that Hoffman called him and asked him if he would run the elevator; that he went up to the second floor; that Hoff-

man and the two men got out; that Hoffman got back in the elevator and asked him if he would run it down, and the witness said he would; that Hoffman went up to the third floor, got out of the elevator, and just then the bell rang and Hoffman went back to the office floor; that he ran the elevator down to the first floor, where there were three or four people waiting; that Hoffman started to "rooming" the people and asked him if he would go up to the second floor and tell the two gentlemen he had left on the second floor to step into the parlor and he would be back in a few minutes; that he went up and met Agents Justi and O'Hara and told them that Hoffman said to ask them to step in the parlor and he would be back in a few minutes; that was all the conversation he had with them. He also testified that he did not live in the hotel; that he never sold any liquor; that he was married and lived with his family on Lakeview Boulevard; that his only connection with the hotel was that the Rainier Taxicab Company had its office there. On cross-examination he testified that he ran the elevator sometimes ten, fifteen or twenty times a day; that on the day in question he simply rode up in the elevator and back down with Hoffman; that he got out of

the elevator when it reached the bottom; that Hoffman asked him to go up and tell the people on the second floor to step into the parlor; that he walked up the stairs to the second floor and me the two men, told them that the clerk was busy and would be back in a few minutes; that nothing was said about liquor by any one (Tr. 19-22).

Emil Hoffman, one of the defendants, testified that he made the sale of liquor to O'Hara and the other agent and got $20 for it; that he was arrested; that the defendant Ward had no interest in the liquor or in its sale; that he made it himself; that he made a sale earlier in the day, in room 606; that he asked the defendant Ward to run the elevator a few minutes; that he got in the elevator and went up to the second floor; that he got out with O'Hara and Justi; that they asked him for a bottle of scotch and a bottle of bourbon; that he got back into the elevator and went to the third floor; that just then the bell rang and, thinking it was some one wanting a room, he went down again; that while he was registering the people he asked Ward to go up and tell the two men on the second floor to go into the parlor and wait there for him; that in about ten minutes he went back up in the elevator,

got two bottles of whiskey, brought it back and delivered it to the agents and took the money. He testified that no one was in the room besides himself and the agents when he made the sale. On cross-examination he testified he was still working at the New Avon Hotel, as clerk and bell boy; that he was employed by the defendant Furihata; that he went up in the elevator with O'Hara and Justi and got out with them on the second floor; that they asked him for some bourbon and scotch; that he told them he had no bourbon; that he went up to the second floor and the bell rang and he went down to the office, and while he was waiting on the people he asked Ward to go upstairs and tell the two men on the second floor to go into room 204, that he would be there in a little while; that after he got through registering the people he went up to 402 and got two bottles, brought them down to the second floor and delivered them (Tr. 22-24).

Motion for directed verdict on each count as to the defendant Ward was renewed at the close of the testimony. The motion was again denied and an exception allowed (Tr. 24).

I.

An examination of the evidence will show that the plaintiff-in-error Ward was the manager of the Rainier Taxicab Company, which had its office and switchboard in the lobby of the New Avon Hotel; that the defendant Hoffman was the hotel clerk and in this connection ran the elevator; that plaintiff-in-error Furihata was the lessee of the hotel. The evidence further discloses that the only connection this plaintiff-in-error had with the hotel, in addition to having his office there, was that at times he and other employees of the taxicab company would run the elevator for the clerk when he was busy.

The Government witnesses did not testify that they ever had any agreement with Ward or that Ward ever assented by word or deed to the sale of liquor. There is no evidence of any agency shown between Ward and the other defendants. There is a total lack of evidence showing that Ward had any knowledge of what O'Hara and Justi were doing in the hotel on that day, or what their business with Hoffman was.

It is the contention of this plaintiff-in-error, on the face of the record, that there is no evidence

upon which this verdict of guilty as to the sale of liquor could be based as against him.

In *Scoggins vs. United States,* 255 Fed. 825, speaking on this question, the Circuit Court of Appeals for the Eighth Circuit said:

> "But it is indispensable to the maintenance of this verdict and judgment that there should have been substantial evidence of a sale or of an offer to sell som eof the whiskey by the defendant.
>
> " 'A sale is a contract for the transfer of property from one person to another for a valuable consideration.' 7 Words and Phrases, 'Sale,' pp. 6291, 6292.
>
> " 'To constitute such a sale there must be the assent of the two parties; there must be a vendor and a vendee. But no words need be proved to have been spoken. A sale may be inferred from the acts of the parties, and no disguise which the parties may attempt to throw over the transaction, with a view of evading the penalty of the law, can avail them, if in truth such sale is found to have taken place.' *Commonwealth vs. Thayer,* 49 Mass. (8 Metc.), 525, 526.
>
> "But one party cannot make a contract of sale. No such contract can be made without assent of the minds of two parties at the same time to the sale and to the terms of the sale, to the subject-matter and the consideration of the sale; and as the alleged contract here was ille-

gal, and its making criminal, the legal presumption was that the defendant did not make it, and this presumption prevailed until he was proved to have done so beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction."

In re. Iowa, 110 U. S. 471, 28 L. ed. 200:

"A sale, in the ordinary meaning of the word, is a transfer of property for a price."

Williamson vs. Berry, 8 Howard 495.
McNutt vs. United States, 267 Fed. 670.
Commonwealth vs. Davis, 75 Ky. 241.
Cooper vs. State, 35 Ark. 412.

Under the above authorities there is no evidence upon which the verdict of the jury that the defendant Ward was guilty of making a sale can be based. The jury by their verdict on Count I found that he did not possess the liquor that by their verdict on Count II they say he sold. In other words, the jury found by their verdict on Count I that Ward had no dominion or control over this liquor. There is no proof that he had an agreement for its transfer or that he was interested in it in any way; no proof that he assented to the sale, and no proof that he

ever knew about it until his arrest.

The Government's evidence is that he was not present when it was made; it is admitted that he ran the elevator and delivered a message to the agents, but this falls short of proof that he made a sale. His evidence and the evidence of Hoffman stands uncontradicted that as an accommodation he often ran the elevator. This fact and the fact that he delivered Hoffman's message to the agents is the only evidence by which the Government attempts to tie Ward to this transaction—facts that are just as consistent with innocence as guilt.

Taken in connection with the plaintiff-in-error's testimony that he made no sale, had no interest in it, knew nothing about it, and with Hoffman's testimony that he made the sale and that Ward had nothing to do with it and no interest in it—this evidence falls short of showing a sale on the part of Ward.

This plaintiff-in-error is charged as a principal. The Government will probably contend that under Section 10506 Comp. Stat., he is a principal. However, that section requires proof that he *knowingly* aided and abetted; and unless there is evidence that

he had knowledge of the offense, he cannot be a principal. There is no such proof here.

Rizzo vs. United States, 275 Fed. 51.

II.

By Count I of the information this plaintiff-in-error was found not guilty of possesing the liquor that the jury found him guilty of selling under Count II.

It is the contention of this plaintiff-in-error that the verdict is repugnant and void for inconsistency; that a man cannot be guilty of selling liquor and innocent of possesing the identical liquor with the intention of selling the same.

In the case of *Rosenthal vs. United States,* 276 Fed. 714, this court held that where one count of an indictment charged a defendant with having bought or received stolen property, with knowledge that it was stolen, and another count charged him with having the same property in his possession with like knowledge, were based on the same transaction, and the evidence showed only one transaction, a verdict finding the defendant not guilty on the first count and guilty on the second count was

wholly inconsistent and required a reversal. In that case the court says, at page 715:

> "The difficulty is that there was but one transaction involved in the two counts of the indictment, which was based upon the statute mentioned, and, according to the evidence, but one transaction between the plaintiff-in-error and the thieves. By its verdict upon the first count of the indictment the jury found that the plaintiff-in-error neither bought nor received the cigarettes from them with knowledge of the theft, and by its verdict upon the second count that the plaintiff-in-error was at the same time and place in possession of the property with such guilty knowledge. The two findings were thus wholly inconsistent and conflicting."

In the case of *Baldini vs. United States,* 286 Fed. 133, this court, referring to the *Rosenthal* case with approval, said:

> "Counsel for the Government rightly concede that, if the two counts related to the same transaction, the position taken on behalf of the plaintiff-in-error is valid" (p. 134).

A case exactly in point is *Kuck vs. State,* 99 S. E. 622. It will be seen that the *Kuck* case is a case where the defendant was found guilty of selling liquor. Quoting from the decision:

> "The offense of having, controlling, and possessing spirituous liquors in this state, as alleged in the second count, could be committed

without making a sale of the spirituous liquors; but the offense of selling, which contemplates delivery within the meaning of the prohibition statutes as the culminating feature of the sale, could not be committed without having, controlling, or possessing liquors. There would be no inconsistency or repugnancy in the verdict of guilty under the second count and not guilty under the first count, but there would be inconsistency and repugnancy in a verdict of guilty under the first count and not guilty under the second count; for, if there were no 'having, controlling, or possessing,' there could be no 'selling.' In the latter instance the repugnancy is as complete as in the case of *Southern Ry. Co. vs. Harbin,* 135 Gar. 122, 68 S. E. 1103, 30 L. R. A. (N. S.) 404, 21 Ann. Cas. 1011, where on acount of repugnancy a verdict was set aside. The verdict found damages against the railroad and no liability against its employe in operating the engine of the company."

2 *Bishop New Criminal Procedure, sec.* 1015a (5):

"No form of verdict will be good which creates a repugnancy or absurdity in the conviction."

16 *Corpus Juris,* sec. 2596-5:

"A verdict on several counts must not be inconsistent."

Other examples of where inconsistent verdicts were not allowed to stand are:

Commonwealth vs. Haskins, 128 Mass. 60.
State vs. Rowe, 44 S. W. 266. (Mo.).
Toben vs. The People, 104 Ill. 565.
Southern Ry. Co. vs. Harbin, 68 S. E. 1103 (Ga.).

Sipes vs. Puget Sound Electric Co., 54 Wash. 55.

Doremus vs. Root, 23 Wash. 710.

In *Woods vs. United States*, 290 Fed. 957, the principle that we are contending for is recognized by this court. In that case this court decided that a druggist could lawfully possess liquor, but a sale of that liquor was unlawful under the facts. There is no such question in this case.

It is a conceded fact that Exhibits 1 and 2, the liquor charged by the government to have been sold under Count II, was a part of the liquor which it was claimed by the government the parties possessed under Count I. What could be more repugnant and inconsistent? A simultaneous finding is made that the defendant did not possess the identical liquor he sold with intent to sell it. Sale is an indication of possession.

III.

The court gave the following instruction as set out in Assignment VIII:

> "If the defendant Ward is guilty in this case it is upon what he did that day, his conduct in operating the elevator, his relation to the transaction between Hoffman and the agents who bought it, and what, if anything, he said to the operators (38) when they came there for the purpose of purchasing it. He said he did nothing except to operate the elevator as a favor, which he did sometimes. The Government witnesses testified that they asked Ward for some whiskey or some liquor, and he said, 'We haven't that,' and you remember what their testimony was, and if he did actively participate in the operation of the elevator, and carried these parties up and was conscious of what was transpiring, and did it in the advancement of a sale between the parties participating in it, and did use the conversation and statements that I have indicated, directing or suggesting some other brand instead of that which was demanded, and actually participated in the transaction and closing of the sale, why then he would be guilty of sale, and likewise, of possession. Lf that was the only connection the defendant Ward had with relation to the matter you would not be warranted in finding the defendant Ward guilty of the nuisance count, because that transaction alone, of itself, would not be sufficient to find the defendant Ward guilty of a nuisance, but would be sufficient to find him guilty of possession and of sale."

This instruction is bad for the reason that the record does not disclose that there was any testimony that government witnesses "asked Ward for some whiskey or some liquor and he said 'We haven't that' * * *," and again there is no evidence to sustain that part of the instruction that he suggested some other brand. There is no evidence in the record to justify such an instruction—the entire instruction is based on the implied assumption that what Ward did on that day, his conduct, and running the elevator was assisting in consummating a sale. The evidence does not justify such an instruction on his conduct. The jury should have been told that if his conduct was just as consistent with innocence as guilt he would not be guilty.

IV.

The court gave the following instruction as set out in Assignment of Error IX:

> "A person may make a sale and not be in possession, by bringing the parties together, or being a party to bringing the parties together, and at the sale, and participating himself in (39) carrying out the transaction, and not be in the possession of the liquor himself, it being elsewhere in the possession of some other party, he could be a party to a sale and not be in possession."

This was error, as there is no evidence in the case that any one brought the parties together. The Government's testimony is that O'Hara knew Hoffman, had bought liquor from him and went down to the hotel that day to buy from Hoffman, and did buy from him.

Likewise it is bad for the reason that there is no evidence in the record that any one participated in or carried out the sale except the defendant Hoffman.

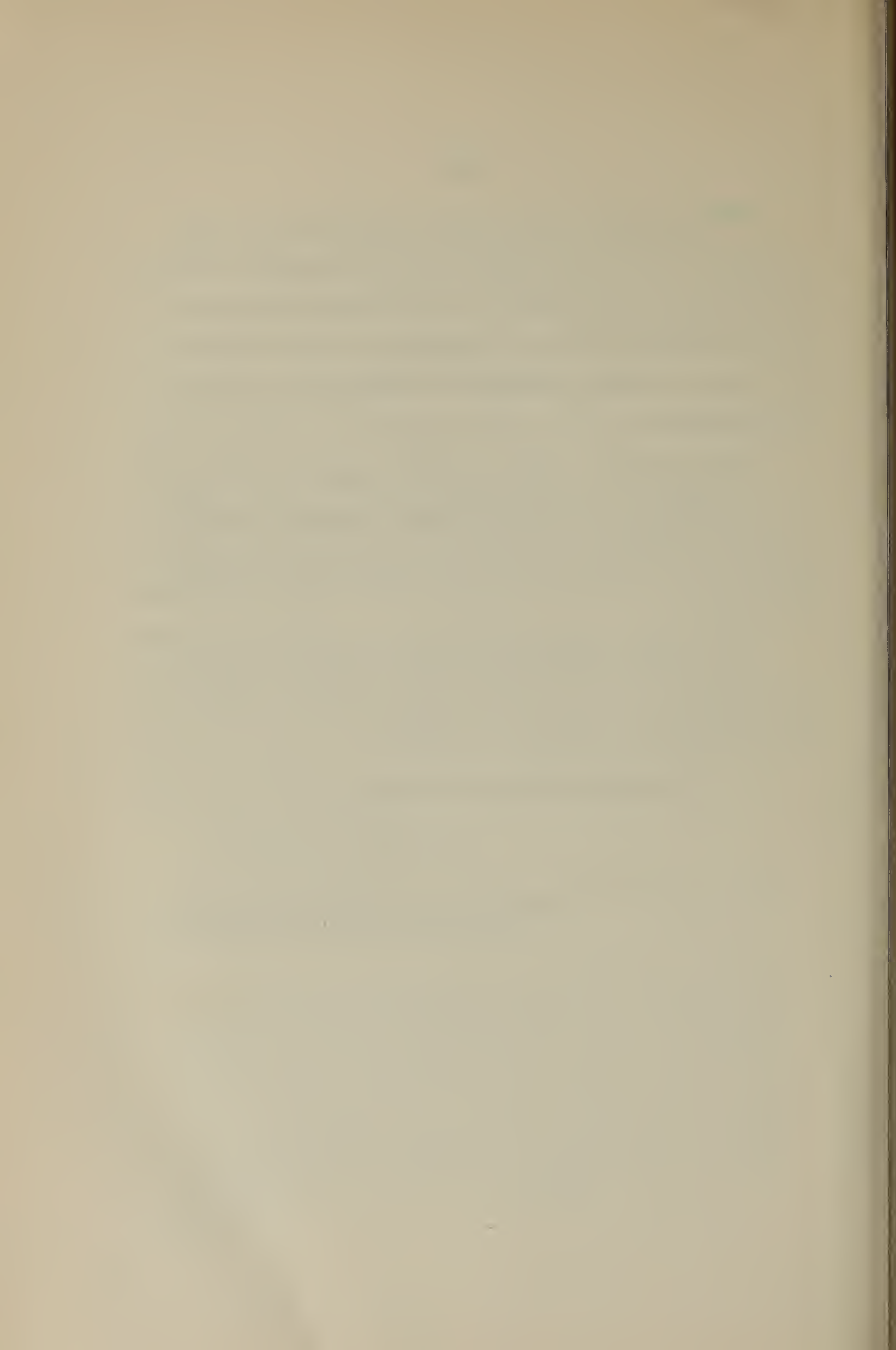
For errors asisgned herein, the motion in arrest of judgment should be granted or, in the alternative, a new trial should be ordered.

Respectfully submitted,

JOHN F. DORE,

F. C. REAGAN,

Attorneys for Plaintiff-in-Error.



In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4392

BERNARD WARD and T. FURIHATA,
Plaintiffs-in-Error

vs.

UNITED STATES OF AMERICA,
Defendant-in-Error

Upon Writ of Error to the United States District Court
for the Western District of Washington
Northern Division

Brief of Defendant in Error

FILED

THOS. P. REVELLE
United States Attorney

J. W. HOAR
Assistant United States Attorney

Attorneys for Defendant-in-Error

Office and Post Office Address:
310 Federal Building, Seattle, Washington

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4392

BERNARD WARD and T. FURIHATA,
Plaintiffs-in-Error

vs.

UNITED STATES OF AMERICA,
Defendant-in-Error

Upon Writ of Error to the United States District Court
for the Western District of Washington
Northern Division

Brief of Defendant in Error

ARGUMENT

Answer to Paragraph I.

The cases cited by counsel for plaintiff-in-error Ward are beside the point in this case. There is no question as to whether or not a sale was con-

summated. It is admitted that the liquor was delivered, and money paid therefor.

The only question involved is whether or not there was sufficient evidence to show that plaintiff-in-error Ward was one of the vendors. There was evidence to show that the whiskey was ordered in the elevator when both defendants Hoffman and Ward were present; that after the government agents got out of the elevator on the second floor, both Hoffman and Ward continued on up in the elevator; that Ward came down in three or four minutes and directed agents into room No. 204, saying that "Hoffman would bring the stuff there" (Tr., p. 16); that Hoffman followed soon after with the two bottles of whiskey and was given Twenty Dollars ($20.00) in marked money.

It is submitted that there was ample evidence here to show that Ward knew what was going on, and sufficient to satisfy the jury that he had an interest in the sale, and the verdict shows that the jury did not believe Ward's explanation of the part played by him in the transaction. There certainly was a meeting of the minds in this transaction.

Answer to Paragraph II.

Counsel contends that there is an inconsistency in the finding of the jury, wherein the jury found Ward not guilty of possession, but guilty of sale. Counsel says: "It is a conceded fact that the liquor charged by the government to have been sold under Count II was a part of the liquor which it was claimed by the Government the parties possessed under Count I."

So far as the Government is concerned it is *not a conceded fact*, that the same liquor is involved in both counts. The Transcript of Record has been searched thoroughlv from cover to cover, and counsel for plaintiff-in-error is challenged to show wherein there is any proof that the same liquor was involved in both counts. On page 7 of the Transcript beginning with line six, we find the following:

"Government exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 are introduced as evidence. Government rests. Motion is made by defendants that Government be required to elect which group of liquor set forth in count I it will select to establish charge of possession. Said motion is granted. J. F. Dore for defendants moves for a directed verdict of not guilty as to defendant Ward

on count I, as to defendant Hoffman on count III and as to defendant Furihata on count II. All said motions are denied with exception allowed."

On page 18 the evidence introduced in spport of the charge under count I is as follows:

"William M. Whitney, a witness produced on behalf of the Government, being duly sworn, testified as follows:

"Direct Examination

"I never saw Ward before his arrest. I made a search of rooms in the New Avon Hotel on August 17, 1922, and found liquor in a great many of the rooms. (The witness gave the number of the rooms.)

"It was admitted at this time that Prohibition Agents Lindville and Stetson would testify that liquor had been found in various rooms in the New Avon Hotel."

It is impossible to see how this court can determine from *this record* that the liquor involved in the possession count I is part of the liquor involved in the sale count II. The defendants were charged in count I with the possession of 27 bottles, each containing one-fifth gallon of a certain liquor known as whiskey; 13 pints of a certain liquor known as whiskey; 60 pints of a certain liquor known as distilled spirits; 17 quarts of a certain liquor known as beer, and four bottles each

containing one-fifth gallon of a certain liquor known as gin.

The fact that counsel for plaintiff-in-error Ward moved for a directed verdict of not guilty as to defendant Ward, alone, on count I only would indicate that the group of liquor selected by the Government did not involve the two bottles of liquor involved in the sale count II.

Counsel for plaintiff-in-error can get little comfort from the case cited by him of *Baldini v. United States*, 286 Fed. 133 (9 C. C. A.) at bottom of page 134, where this court said:

"We therefore think it clear that the record fails to show that the two alleged offenses related to the same transaction. It hardly needs to be said that no presumption to that effect can be indulged. See *Com. v. Lowery*, 159 Mass. 62, 34, N. E. 81, and cases there cited. Finding no error for which the judgment should be reversed, it is affirmed."

The court cannot go outside of the record before it, and is in the same position here as it was in the case just cited. Even if it were conceded that the same liquor was involved in counts I and II, there is no evidence in the record to show from which room, or from what source, the liquor came, and if this court followed the decision of the Cir-

cuit Court for the Sixth Circuit in the case of *Miller v. U. S.*, 300 Fed. 529. (7) p. 534, where, under the circumstances in that case it held possession to be a part of the sale, and that conviction under both counts to be a double prosecution. It could hold in this case that there is no inconsistency in the finding of the jury, and certainly not to the prejudice of Ward's rights. That case is one of many in which a salesman might be guilty of selling, and never have actual possession of the liquor.

Answer to Paragraph III.

Exception is taken to certain instructions and comments of the court. If the court made an error in referring to defendant Ward, the Government contends that it was harmless error. In the first place Ward was in the elevator while the conversation with regard to the sale of liquor was being carried on, and while the order was being given for the same, knew what it was about, went on up in the elevator with defendant Hoffman, came down and told the agents where to go, and took practically as much part in the transaction as defendant Hoffman, with the exception of the actual manual delivery of the liquor.

In addition to that portion of the instructions cited by counsel (Tr., pp. 30-31), the court said:

"You will simply conclude this case upon the evidence which is presented before you, and on the circumstances which have been detailed by the witnesses, and draw such inferences as are justified from all the facts and circumstances, together with the testimony which has been presented.

"Circumstantial evidence is just such testimony as the circumstances show of the facts to exist; it is legal and competent in criminal cases, but the circumstances must be consistent with each other; consistent with the guilt of the parties charged, and inconsistent with their innocense — inconsistent with every other reasonable hypothesis except that of guilt, and when it is of that character then it is sufficient to convict the parties. In this case you have the direct testimony, and you likewise have the circumstantial evidence, and you will take and weigh the both of them together."

From the foregoing it would appear that the rights of the defendant were carefully safeguarded by the court.

Answer to Paragraph IV.

The Government submits that sufficient evidence was introduced from which the jury could well conclude that defendant Ward did take part in the sale even though he did not deliver the liquor;

and that the instruction of the court complained of is correct and is sustained by the *Miller* case cited above.

It is submitted that the defendant Ward has had a fair trial and that the sentence of the lower court should be affirmed.

As to Plaintiff-in-Error Furihata

Contention is made by the plaintiff-in-error Furihata that there was insufficient evidence upon which to convict him of all three counts, namely, of possession, sale and maintaining a common nuisance, because he was not present on the occasions when agents made purchases on the premises, and had no knowledge of the activities of the defendant Hoffman, his employe, and did not consent to same.

The evidence of W. M. Whitney, and other agents (Tr., p. 18) shows that a large quantity of liquor, the amounts being set out in count I of the Information, was found in various rooms of the hotel. The record does not show that any of the liquor was found in the rooms occupied by guests in the hotel (except rooms 217 and 606, which liquor was excluded by the court in his instructions), and hence it must be inferred that these rooms were unoccu-

pied and consequently under the control of the owner.

The evidence of Gordon B. O'Hara (Tr., p. 15) shows that on his first visit Hoffman told him he could supply *any amount* of liquor he might want, which was not denied.

The evidence showed that this was a small hotel, and that the defendant Hoffman had been employed by Furihata for but a few days; and the jury by their verdict showed that they did not believe it was possible to have so much liquor concealed about a small hotel for sale in unlimited quantities to strangers without the knowledge and acquiescence of Furihata, the lessee, the employer and proprietor.

The facts are undisputed that the liquor was found there, and that the rooms were under lock and under the control of the owner. Furihata did not take the stand and account for the presence of the liquor in these unoccupied rooms * * * so that the only conclusion the jury could come to was that the liquor belonged to him, and was there for the purpose of sale.

While defendant Hoffman testified that the first sale he made was in his own room No. 606, and

from his own liquor, and while he claimed the liquor he obtained from room No. 402 was his own, he could not explain the presence of so much liquor in so many other rooms sufficiently well to satisfy the jury that he, alone, was interested in the great quantity of liquor found.

Had this case been one involving only the first sale to the agent of a drink, made by Hoffman in his own room, it is conceded that there might be merit in the contention of plaintiff-in-error Furihata; the court did exclude all evidence of liquor in room 606 and in room 217, and protected the rights of Furihatain in every way possible; but a landlord of a hotel cannot permit large quantities of intoxicating liquor to remain upon his premises, hire some one else to dispense it, and then shut his eyes like the proverbial ostrich and escape the penalties which the law exacts from him when discovered.

It has been repeatedly held that one or two sales of intoxicating liquor, when made under conditions which show that the premises were habitually used for the sale of liquor, are sufficient to sustain a conviction of maintaining a common nuisance, to which rule this case is no exception.

Young v. U. S., 272 Fed. 967 (9 C. C. A.);
Fassolla v. U. S., 285 Fed. 378 (9 C. C. A.);
Panzich v. U. S., 285 Fed. 871 (9 C. C. A.);
Traversi v. U. S., 288 Fed. 375 (9 C. C. A.);
Singer v. U. S., 288 Fed. 695 (3 C. C. A.);
Barker v. U. S., 289 Fed. 249 (4 C. C. A.);
Marshallo v. U. S., 298 Fed. 74 (2 C. C. A.).

The jury heard all of the evidence, saw the witnesses, received full and proper instructions from the court, and after a full consideration of the evidence, found defendant Furihata guilty on all counts as charged.

It is submitted that the defendant has had a full, fair and impartial trial, and that the judgment of the lower court should be affirmed.

Respectfully submitted,

THOS. P. REVELLE
United States Attorney
J. W. HOAR
Assistant United States Attorney

Attorneys for Defendant-in-Error.

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4392

UNITED STATES OF AMERICA,
Defendant-in-Error,

vs.

BERNARD WARD and T. FURIHATA,
Plaintiffs-in-Error.

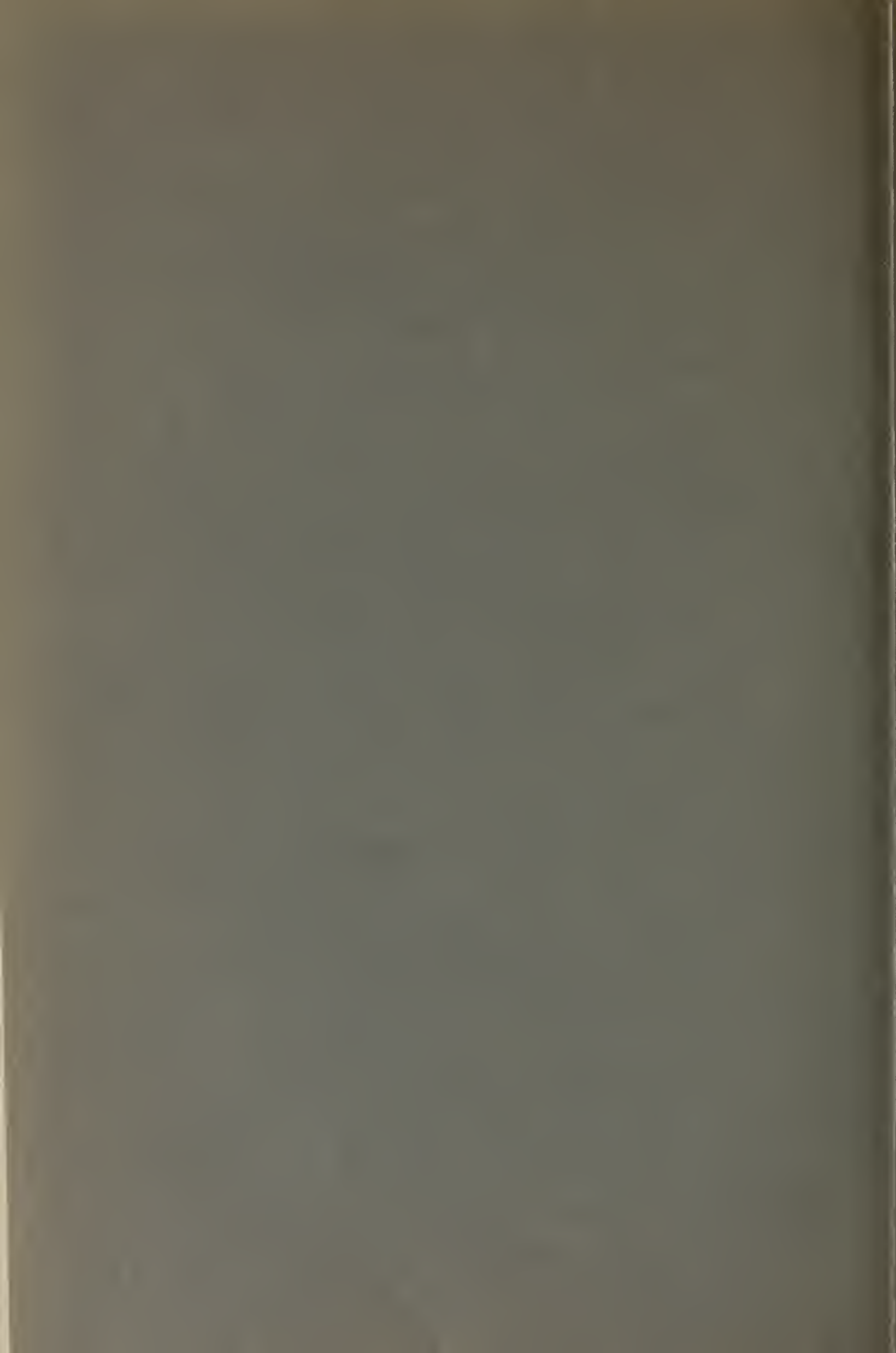
WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

Petition for Rehearing

FILED
MAY 4 - 1925
F. D. MONCKTON

WALTER METZENBAUM
Attorney for Plaintiff-in-Error,
500 Pacific Block, Seattle, Washington



United States Circuit Court of Appeals

For the Ninth Circuit

No. 4392

UNITED STATES OF AMERICA,
Defendant-in-Error,

vs.

BERNARD WARD and T. FURIHATA,
Plaintiffs-in-Error.

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

Petition for Rehearing

PETITION FOR REHEARING

The plaintiff-in-error T. Furihata respectfully petitions this court for a rehearing of his writ of error and submits to the court that a more careful consideration of the contentions of your petitioner

will convince the court that error was committed by the trial court during the trial of your petitioner.

The opinion of this court which deals with your petitioner does consider his contention that there was not sufficient evidence to justify the verdict and finds adversely towards this contention, but not one word of the opinion even makes mention of his contentions that the INSTRUCTIONS of the trial court were erroneous and prejudicial to this plaintiff-in-error.

This entire absence of comment on these errors lead your petitioner to believe that they were inadvertently overlooked and we respectfully implore this court to consider the contentions and authorities contained in pages 10 to 19 of petitioner's brief.

Your petitioner believes that the doctrine and theory contained in the court's instructions are not only erroneous but impossible.

The court in effect said that a proprietor of a hotel is presumed to be in possession of everything contained in every unoccupied room. Prompt and timely exceptions to the instructions were taken by counsel and a colloquy between counsel and the

court was engaged in over these very instructions. All of this is set forth verbatim in petitioner's brief.

It is not the purpose of petitioner to argue the propriety of these instructions in this petition, but he does ask this court to consider these instructions and the arguments and authorities set forth on pages 10 to 19 of his printed brief.

The instructions of the trial court make every hotel proprietor criminally responsible for every drop of liquor found in every unoccupied hotel room no matter how large or how small the hotel. We do not believe that this court will subscribe to that doctrine.

It is for the purpose of calling this court's attention to its entire failure to consider the errors pertaining to INSTRUCTIONS that this petition is filed, and we respectfully pray that a full consideration may be given to the errors that appear in the instructions and a new trial ordered.

Respectfully submitted,

WALTER METZENBAUM,

Attorney for Plaintiff-in-Error T. Furihata.

Certificate of Counsel
Under Rule 29.

I hereby certify that the foregoing Petition for Rehearing is in my judgment well founded, and that it is not interposed for delay. This certificate is made for the purpose of complying with rule No. 29, Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

WALTER METZENBAUM,

Attorney for Petitioner.

No. 4393

/3

United States
Circuit Court of Appeals
For the Ninth Circuit.

HENRY HEITMAN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

FILED
NOV 1 8 1924
F. D. MONCKTON,
CLERK

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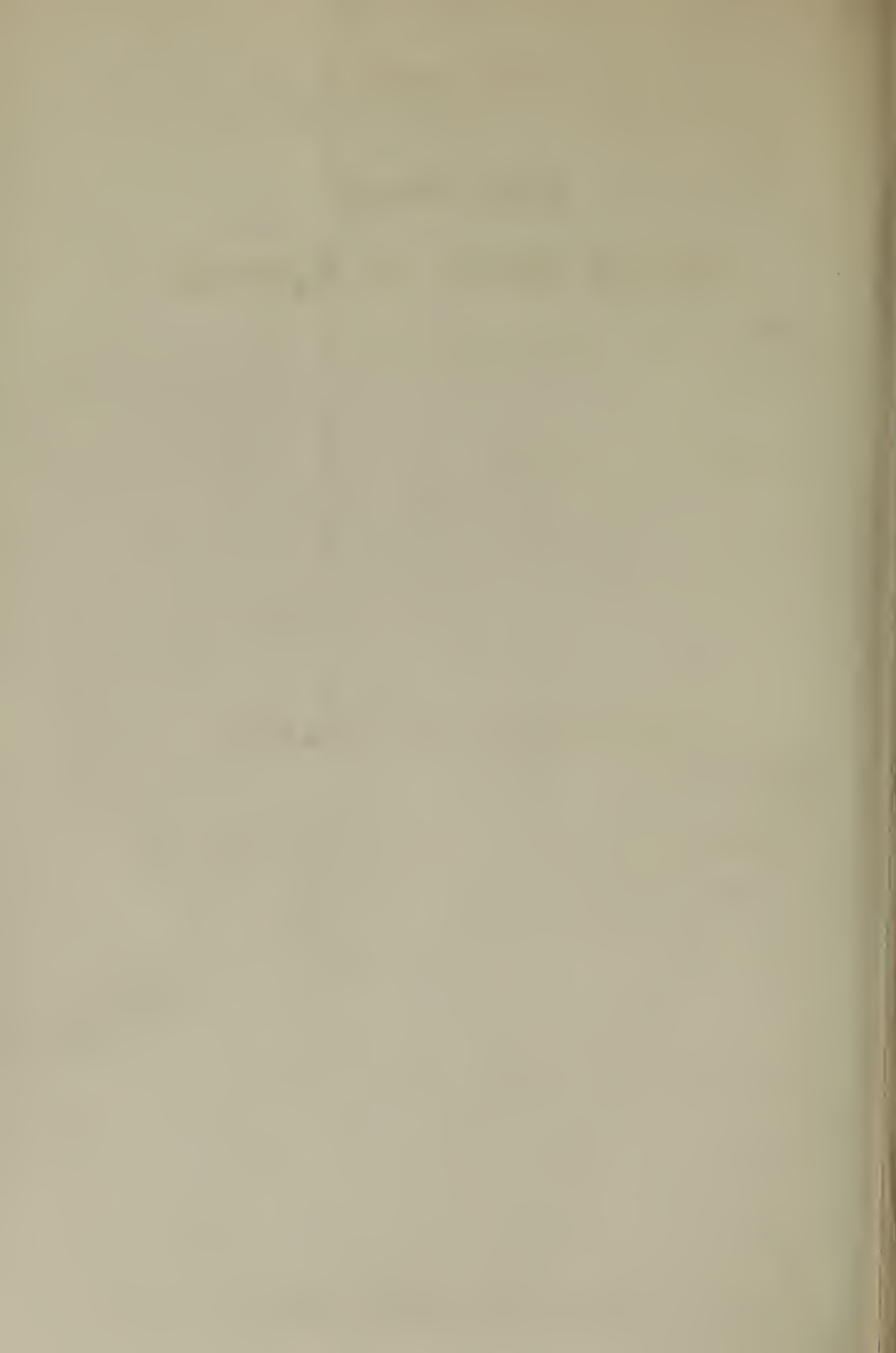

No. 4393

United States
Circuit Court of Appeals
For the Ninth Circuit.

HENRY HEITMAN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Arraignment and Plea	10
Assignment of Errors	74
Bill of Exceptions	14
Certificate of Clerk U. S. District Court to Transcript on Writ of Error	89
Charge to the Jury	58
Citation on Writ of Error	92
Exhibit (Certificate of Registration of Henry Heitmann)	52
Information	3
Judgment on Verdict of Guilty	71
Minutes of Court—April 16, 1924—Trial and Judgment	11
Minutes of Court—June 14, 1923—Arraignment and Plea	10
Motion in Arrest of Judgment	69
Motion for a New Trial	68
Names and Addresses of Attorneys of Record	1
Notice of Presentation of Bill of Exceptions	64
Order Allowing Writ of Error and Supersedeas	88
Order Settling Bill of Exceptions	66
Petition for Writ of Error and Supersedeas	73

Index. Page

Praecipe for Transcript of Record............ 1
Return to Writ of Error.................... 91
Stipulation Re Bill of Exceptions............ 65

TESTIMONY ON BEHALF OF THE GOVERNMENT:

BERNHARD, J. 16
Cross-examination 22
Redirect Examination 22
CORY, I. H. 27
Cross-examination 29
KOSS, K. H. 29
Cross-examination 30
POWERS, E. A. 23
Cross-examination 25

TESTIMONY ON BEHALF OF DEFENDANT:

HEITMANN, HENRY 33
Cross-examination 34
O'DEA, EDWARD A. 32
Trial and Judgment 11
Verdict 67
Writ of Error............................. 90

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Defendant and Plaintiff in Error:
EDWARD A. O'DEA, Esq., Phelan Bldg., San Francisco, California.

For Plaintiff and Defendant in Error:
UNITED STATES ATTORNEY, San Francisco.

In the Southern Division of the United States District Court for the Northern District of California.

Clerk's Office.

No. 13,551.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY HEITMAN,
Defendant.

PRAECIPE (FOR TRANSCRIPT OF RECORD).

To the Clerk of Said Court:

Sir: Please prepare the transcript of record upon writ of error in the above-entitled cause and the following:

1. Information.
2. Arraignment.
3. Plea of defendant.
4. Record of trial.

5. Verdict of jury.
6. Motion for new trial.
7. Motion in arrest of judgment.
8. Order denying motion for new trial.
9. Order denying motion in arrest of judgment.
10. Judgment of the Court.
11. Petition for writ of error.
12. Assignment of errors.
13. Order allowing writ of error and supersedeas.
14. Bill of exceptions.
15. Writ of error (original).
16. Citation on writ of error.
17. Return thereto. [1*]
18. Clerk's certificate to transcript of record.

EDWARD A. O'DEA,
Attorney for Defendant.

[Endorsed]: Filed Oct. 20, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY HEITMAN and J. HARRIS,
Defendants.

*Page-number appearing at foot of page of original certified Transcript of Record.

INFORMATION.

At the March term of said court in the year of our Lord one thousand nine hundred and twenty.

BE IT REMEMBERED that John T. Williams, United States Attorney for the Northern District of California, by and through Kenneth M. Green, Special Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 13th day of June, 1923, and with leave of the said court first having been had and obtained, gives the court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof:

NOW, THEREFORE, your informant presents. THAT

HENRY HEITMAN and J. HARRIS

hereinafter called the defendants, heretofore, to wit, on or [3] about the 4th day of June, 1923, at 950 Hampshire St., in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there willfully and unlawfully maintain a common nuisance in that the said defendants did then and

there willfully and unlawfully keep for sale on the premises aforesaid certain intoxicating liquor, to wit:

2 120-gallon stills; 4 burners; 2 pressure tanks; tanks;

5 500-gallon vats, 3 hydrometers; 3,000 gallons of mash; 100 gallons of what is called jackass brandy.

then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid, was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof. [4]

NOW, THEREFORE, your informant presents: THAT

HENRY HEITMAN and J. HARRIS,

hereinafter called the defendants, heretofore, to wit, on or about the 4th day of June, 1923, at 950 Hampshire St., in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, then and there being, did then and there willfully and unlawfully possess certain intoxicating liquor, to wit:

2 120–gallon stills; 4 burners; 2 pressure tanks;
5 500–gallon vats; 3 hydrometers, 3,000 gallons of mash; 100 gallons of what is called jackass brandy

then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 18, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

THIRD COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a [5] part hereof.

NOW, THEREFORE, your informant presents: THAT

HENRY HEITMAN and J. HARRIS

hereinafter called the defendants, heretofore, to wit, on or about the 4th day of June, 1923, at 950 Hampshire St., in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, then and there being, did then and there willfully and unlawfully have in their possession certain property designed for the manufacture of certain intoxicating liquor, to wit:

4 burners; 2 pressure tanks, 5 500–gallon vats; 3 hydrometers; 3,000 gallons of mash; 100 gallons what is called jackass brandy,

then and there intended for use in violating Title II of the Act of October 28, 1919, to wit, the National Prohibition Act, in the manufacture of intoxicating liquor then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said property by the said defendants at the time and place aforesaid was

then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN T. WILLIAMS,
United States Attorney.
KENNETH M. GREEN,
Special Asst. U. S. Attorney. [6]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

E. A. Powers, being first duly sworn, deposes and says: THAT

HENRY HEITMAN and J. HARRIS,

on or about the 4th day of June, 1923, at 950 Hampshire St., City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there maintain a common nuisance in that the said defendant did then and there keep for sale on the premises at 950 Hampshire St. aforesaid certain intoxicating liquor, to wit:

2 120-gallon stills, 4 burners, 2 pressure tanks, 5 500-gallon vats, 3 hydrometers, 3,000 gallons of mash, 100 gallons of what is called jackass brandy

then and there containing one-half of one per cent

or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

And affiant on his oath aforesaid further deposes and says: THAT

HENRY HEITMANN and J. HARRIS,

on or about the 4th day of June, 1923, at 950 Hampshire St., City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction [7] of this court, did then and there possess certain intoxicating liquor, to wit,

2 120-gallon stills; 4 burners; 2 pressure tanks;
5 500-gallon vats; 3 hydrometers; 3,000 gallons mash; 100 gallons of what is called jackass brandy

then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendants was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October, 28, 1919, to wit, the "National Prohibition Act."

And affiant on his oath aforesaid further deposes and says: THAT

HENRY HEITMANN and J. HARRIS
on the 4th day of June, 1923, at 950 Hampshire St., City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, did then and there willfully and unlawfully have in their possession certain property designed for the manufacture of intoxicating liquor, to wit:

2 120-gallon stills; 4 burners; 2 pressure tanks; 5 500-gallon vats, 3 hydrometers; 3,000 gallons of mash; 100 gallons of what is called jackass brandy

then and there intended for use in violating Title II of the N. P. A. in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes; [8]

That the possession of the said property by the said ——— at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II, of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

E. A. POWERS.

Subscribed and sworn to before me this 5th day of June, 1923.

[Seal] T. L. BALDWIN,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed June 13, 1923. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [9]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Thursday, the 14th day of June, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable WILLIAM C. VAN FLEET, Judge.

No. 13,551.

UNITED STATES OF AMERICA

vs.

HENRY HEITMAN et al.

MINUTES OF COURT—JUNE 14, 1923—ARRAIGNMENT AND PLEA.

In this case defendant Henry Heitman was present with his attorney. J. F. McDonald, Esq., Asst. U. S. Atty., was present on behalf of United States. Said defendant was arraigned and plead "Not Guilty." On motion of Mr. McDonald Court ordered case continued to June 16, 1923, to be set for trial of said defendant.

Further ordered, on motion of Mr. McDonald, that bench warrant issue for arrest and appearance of defendant J. Harris herein. [10]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the sixteenth day of April, in the year of our Lord one thousand nine hundred and twenty-four. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 13,551.

UNITED STATES OF AMERICA

vs.

HENRY HEITMAN et al.

MINUTES OF COURT—APRIL 16, 1924—TRIAL AND JUDGMENT.

This case came on regularly this day for trial of defendant, Henry Heitmann upon information filed herein against him. Said defendant was present with his attorney, E. A. O'Dea, Esq., J. F. McDonald, Esq., Asst. U. S. Atty., was present for and on behalf of United States. Upon calling of case, all parties answering ready for trial, Court ordered same proceed and that the jury-box be filled from regular panel of trial jurors of this court. Accordingly, the hereinafter named persons, having been duly drawn by lot, sworn, examined and accepted,

were duly sworn as jurors to try the issues herein, viz.:

Oscar J. Beyfuss,	John J. Parker,
S. Lack,	N. W. Sexton,
G. F. Bernard,	Edward T. Foulkes,
W. F. Block,	Frank W. Beacher,
W. L. Beedy,	Benjamin Pitman,
J. H. Shaw,	John Welch.

On motion of Mr. O'Dea, the Court ordered that all persons to be called as witnesses be excluded from the courtroom, [11] during the introduction of evidence, except when on the stand.

Mr. McDonald made opening statement to the Court and jury as to the nature of the case and called J. Bernard, E. A. Powers, I. H. Cory and J. H. Koss, each of whom was duly sworn and examined as a witness on behalf of United States, and introduced in evidence on behalf of United States a certain exhibit which was filed and marked U. S. Exhibit No. 1, and rested.

Mr. O'Dea moved the Court for directed verdict, which motion the Court ordered denied. Mr. O'Dea was then sworn and testified for defendant. Henry Heitmann was sworn and examined for defendant, and thereupon defendant rested.

Mr. McDonald offered in evidence records in case of United States of America, vs. Henry Hitman, number 12,613 in this court. Court ordered said record admitted in evidence. United States thereupon rested.

Case was then argued by counsel for respective parties and submitted, whereupon the Court proceeded to instruct the jury herein and, after being

so instructed, the jury retired at 2:10 P. M., to deliberate upon their verdict and subsequently returned into court at 3:15 P. M., and upon being called all twelve (12) jurors answered to their names and were found to be present, and, in answer to question of the Court, stated they had agreed upon a verdict and presented a written verdict which the Court ordered filed and recorded, viz.: [12]

"We, the jury, find Henry Heitman, the defendant the bar,

Guilty on 1st count,
Guilty on 2d count and
Guilty on 3d count.

A. F. BLOCK, Foreman."

Mr. O'Dea made a motion for a new trial, which motion the Court ordered denied, Mr. O'Dea then made a motion in arrest of judgment, which motion the Court likewise ordered denied.

Thereupon, no cause appearing why judgment should not be pronounced, the Court ordered that defendant Henry Heitman, for offense of which he stands convicted, be imprisoned for period of 1 year in the County Jail, County of San Francisco, State of California, and that he pay a fine in sum of $500.00 or, in default of payment thereof, defendant be further imprisoned until said fine is paid or he be otherwise discharged by due process of law. Ordered that defendant stand committed to custody of U. S. Marshal to execute said judgment, and that a commitment issue.

Ordered that the amount of bond for release and

appearance of defendant herein, pending writ of error, be and is hereby fixed in sum of $3,000.00.

Ordered that the exhibit introduced in evidence on behalf of United States and marked U. S. Exhibit No. 1 be returned and accordingly same was delivered to Mr. McDonald in open court.

Further ordered that the jurors herein be and are hereby discharged from further consideration of this case. [13]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMAN,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That heretofore the United States Attorney in and for the Northern District of California, did file in the above-entitled Court an information against the defendant, Henry Heitmann, and that, thereafter, the said Henry Heitmann appeared in court and upon being called to plead to said information, pleaded "Not Guilty" as shown by the records herein;

AND BE IT FURTHER REMEMBERED, that the defendant, Henry Heitmann, who will hereafter be called the defendant, having duly pleaded "Not Guilty," and the cause being at issue, the same coming on for trial on Wednesday, the 16th day of April, 1924, before the Honorable John S. Partridge, District Judge of said court, and a jury duly impaneled, the United States being represented by J. Fred McDonald, Esq., Assistant United States Attorney, and the defendant being represented by Edward A. O'Dea, Esq., and the following proceedings were had:

J. Fred McDonald, Esq., Assistant United States Attorney, made an opening statement of the case to the jury.

EXCEPTION No. 1.

(Thereupon, Mr. O'Dea addressed the Court in the following language:) [14]

Mr. O'DEA.—"If your Honor please, at this time I ask that the witnesses be excluded."

The COURT.—"All witnesses on both sides will be excluded, except the one designated by the District Attorney to remain with him during the trial."

Mr. O'DEA.—"We have only the defendant."

Mr. McDONALD.—"We ask to have Agent Powers remain here."

Mr. O'DEA.—"Then I ask that Agent Powers be put on the stand first."

The COURT.—"I cannot direct the order of proof on the part of the Government, Mr. O'Dea."

Mr. O'DEA.—"Then that will defeat the purpose of my motion, I don't want these witnesses testify-

ing to the same thing simply because one listens to the other.

The COURT.—"You know, Mr. O'Dea, the rule is that the Government is entitled to designate one officer who may remain in the room. I cannot control the order in which they shall take the stand. However, I think there will no objection to putting Mr. Powers on first."

Mr. McDONALD.—"Your Honor, I want to put Mr. Bernhard on first."

The COURT.—"Then I cannot control that. I am bound by the statute in the matter."

Mr. O'DEA.—"Exception."

(Thereupon, the plaintiff, to maintain the issues on its part to be maintained, introduced and offered in evidence the following testimony, to wit:)

TESTIMONY OF J. BERNHARD, FOR THE GOVERNMENT.

J. BERNHARD, called for the United States, being sworn, testified as follows:

Direct Examination.

I am a Federal Prohibition Officer and was such on the 24th day of [15] June, 1923. On that day, I accompanied Agent Powers to 950 Hampshire Street. When we were within a block of the place, Agent Powers told me that he had information of a still being operated at that number. We got within a block of the place and he said, "Do you smell it?" and I said, "I can smell it very plainly." Coming down to the place, we first went to a little

(Testimony of J. Bernhard.)

office. I believe it was an office. It was kind of a dilapidated building there and took the man who was manager or watchman with us; we went over to this building and I guarded the back window, and Agent Powers went in through the shop. There was a man painting ladders there. I stood at this corner with the manager or watchman and Powers went in through a back door that was partitioned off in the back part of the shop, and he hollered "Federal Officer." I came in then and went up a ladder, up through a trap-door into the upper floor. It was an old barn originally, I believe, and there we found two twenty-gallon stills complete and they were going; fires were under them; they were running full blast. Three thousand gallons of mash; one hundred gallons of jackass brandy; three hydrometers; two pressure tanks; 5 500-gallon vats; 8 15-gallon kegs; three fifty-gallon barrels; four burners, three water buckets and a lot of coal-oil. In the rear of this place, like in the corner, there was a door leading out of the rear of this paint-shop, or barn, and there were two cars there, one was a Ford touring car and the other was a Ford truck. When we got in there, there was nobody up where the stills were going full blast. On going over to the window, we found a cord rope, a cotton cord rope hanging out of the window. The window was open. Whoever was up there operating, there was only one way to get down out of there and that was down that rope. Next door there was a big cooperage place with about a 20-foot fence all a-

(Testimony of J. Bernhard.)

round it, and barrels were piled up high. I then left that place and went over to a drug store and phoned to the office to send out a truck. I left Agent Powers there. When I [16] came back Powers and Heitmann were walking towards me. Powers said, "This is Heitmann; you know him, don't you?" Then Heitmann said, "Now, listen here, can't we fix this thing up."

EXCEPTION No 2.

Mr. O'DEA.—"I ask that that be stricken out (last remark), your Honor."

Mr. McDONALD.—"Heitmann said that?"

WITNESS.—"Yes, sir."

Mr. O'DEA.—"I ask that that be stricken out as immaterial, irrelevant and incompetent and hearsay."

The COURT.—"Motion denied."

Mr. O'DEA.—"Exception."

WITNESS.—(Continuing.) He said, "Can't we fix this thing up? I don't want any trouble." We both laughed at him. We started walking down toward the corner. Then he got a change of heart and said: "Well, I don't care, you fellows haven't got anything on me, anyhow. I didn't have anything to do with that place." His first request, though, was that we fix it up.

EXCEPTION No. 3.

Mr. McDONALD.—"Do you know the defendant, Heitmann, outside of this occasion?"

WITNESS.—"Yes, I have—

(Testimony of J. Bernhard.)

Mr. O'DEA.—"Now, just a moment, I object to that, your Honor, as immaterial, irrelevant and incompetent, and there is nothing involved here which would authorize the District Attorney to elicit the information sought."

Mr. McDONALD.—"Your Honor, there are two charges in this case, one a charge of maintaining a nuisance, and the other the possession of property designed and intended for the manufacture of liquor, on both of those charges we are entitled to introduce and will introduce evidence of the prior arrest and prior conviction of this defendant." [17]

Mr. O'DEA.—"I ask your Honor to instruct the jury against that. That is prejudicial error on the part of the District Attorney."

The COURT.—"Mr. O'Dea, I have passed upon that day after day and day after day. I have uniformly held, and I am satisfied I am right, that where there is a charge of nuisance, evidence of other similar offenses is admissible."

Mr. O'DEA.—"If the Court please, I would like to argue this matter."

The COURT.—"What is the use? I have had it argued time and time again. I have read every authority upon the question and my mind is thoroughly made up. There is no use of repeating arguments on the same question time after time in the welter of cases that I have here. I know the authorities that you will cite, I know them well. I don't agree with you. I am satisfied that the rule in

(Testimony of J. Bernhard.)
regard to nuisance is the rule laid down by the Supreme Court of California in the Redlight Abatement litigation, and that is to the effect that where a nuisance is charged and where the jury must determine as a necessary concomitant of the nuisance what the purpose was for which he had the liquor that it is proper for them to determine that question in the light of previous offenses of the same character. You know the matter has been so fully argued here, and I have called the attention of the bar to this question a number of times. The Supreme Court of California, in People vs. Gray, and the House of Lords in King vs. Manning, and Prof. Wigmore, have all come, independently of one another, to the same conclusion, and that is this, that where the question of intent and the course of general conduct and purpose are questions at issue, that evidence of other similar offenses is admissible. So I have made up my mind on it, Mr. O'Dea. If I am wrong you know how to correct it."

Mr. O'DEA.—"That is not the question I am going to raise. I admit there is the line of authorities your Honor suggests. But that is to show guilty knowledge once they have connected the [18] defendant up with it. They have not connected the defendant up with it at all—

The COURT.—"But you can't prove a case all at once. That is a question of the order of proof. Besides that, the witness has testified this defendant said, 'Can't we fix this up?' You know the

(Testimony of J. Bernhard.)

authorities are unanimous that evidence of that kind is evidence to be considered by the jury as evidence of guilt."

Mr. O'DEA.—"What I want to point out to your Honor is this: There is no evidence here that the defendant was in possession of that stuff, even though he said, 'Can't we fix it up?' What your Honor says might be all right to prove guilty knowledge, or to prove intent, but not to establish a case against the defendant. They must first connect him with that place."

The COURT.—"Well, I think he has been connected. The objection is overruled."

Mr. O'DEA.—"Exception, and I take an exception to your Honor's refusal to instruct the jury as to the remarks of the District Attorney as well."

The COURT.—"Of course, I will do that. The remarks of the District Attorney as to what he expects to prove, Gentlemen, are not evidence. You understand that, I think. Unless it is followed up by evidence from the witnesses, you will disregard it."

Mr. McDONALD.—"Under the ruling of the Court, will you answer my question, did you know Mr. Heitman prior to this date?"

WITNESS.—"I did."

Mr. McDONALD.—"Had you arrested him before?"

WITNESS.—"Well, no, I was not one of the arresting officers, but I came there afterwards, after he was arrested."

(Testimony of J. Bernhard.)

Mr. O'DEA.—"It is understood, your Honor, that I have an objection and an exception to this line of testimony?"

The COURT.—"Yes." [19]

On cross-examination, the witness testified as follows: I could not tell you between what streets 950 Hampshire Street is located. The building from all outward appearance was formerly a barn. There are several manufacturing places around there if I remember right. I first saw the defendant on the sidewalk walking toward me from this 950 Hampshire Street. The barn had an upper and lower floor. On the lower floor, I said before there was a man painting ladders. He had overalls on. I don't know whether it was a regular paint-shop or not. The upstairs portion, I would call a loft of a barn where they formerly stored hay. From the street to the barn where this property was found you would have to go up through a trap-door. The trap-door was in the rear of the paint shop. There was a ladder leading up to the trap-door. When we got up there, Heitmann was not there. I did not see Heitmann at all until I saw him outside with Powers. Heitmann did not offer me any money. All he said to me was, "Can't we fix this up?"

On redirect examination, the witness testified as follows: The bottle I am shown bearing the Internal Revenue label on it is my handwriting. I got the contents of that bottle out of the worm of the still. It was dripping into the bucket. When I

(Testimony of J. Bernhard.)

say, "the worm of the still," I mean the worm of the still at 950 Hampshire Street. I took that bottle and I turned it over to the Internal Revenue Chemist. (Thereupon the bottle and its contents was introduced for purposes of identification and was marked Government's Exhibit 1.)

TESTIMONY OF E. A. POWERS, FOR THE GOVERNMENT.

E. A. POWERS, called for the United States, being sworn, testified as follows:

Direct Examination.

I am a Federal Prohibition Agent and was such on the 4th day of June, 1923. I had occasion to visit the premises at 950 [20] Hampshire Street."

EXCEPTION No. 4.

Mr. McDONALD.—"Will you kindly tell the Court and jury just what happened there and just what you did there?"

WITNESS.—"For the period of about six or seven weeks I had been following Mr. Heitmann on account of remarks he made around town, and it led me into the vicinity of—"

Mr. O'DEA.—"I object to that and ask that it be stricken out."

The COURT.—"Motion denied."

Mr. O'DEA.—"Exception."

WITNESS.—(Continuing.) Hampshire Street. I found that twice he entered the premises on

(Testimony of E. A. Powers.)
Hampshire Street. I have reference to 950 Hampshire Street. There are a lot of small buildings there. I don't know which building he went into. I continued spotting around that place until I got a smell. In fact, you could smell the still in operation and the mash fermenting a block away. So on this date, in company with Mr. Bernhard, I entered the premises. I walked into the little office. I got the manager of the properties I said, 'You have a still operating here.'

Mr. O'DEA.—"Was the defendant there?"

WITNESS.—"No, the defendant was not there."

Mr. O'DEA.—"I object to this as hearsay."

The COURT.—"Just omit what you said."

WITNESS.—(Continuing.) "We walked in and took the manager of the properties with us; we walked back toward the end. I asked Mr. Bernhard to guard the front of the barn while I went around the rear. Then I walked into this barn and on the bottom floor was a man painting ladders. It is not a paint-shop. He had just been repairing and painting ladders in there. The rear was sort of partitioned off and a lock on the door. I broke that lock open and climbed up the ladder. These stills were in operation. I seized [21] the stills; I asked Mr. Bernhard to phone the office, to Mr. Wheeler, who was in charge at that time. I walked downstairs. The manager of the property was still with me. While I was there, the manager asked me come out in the yard. We walked out in the yard. A few minutes afterwards the defendant, Heine

(Testimony of E. A. Powers.)
Heitmann, walked in. He looked around and I said, 'How do you do?' He said, 'How do you do?' I recognized him, and I knew who he was. He walked out. He walked directly to where there were two Ford machines. The manager walked up to him. I was about ten or twelve feet behind; as he walked towards this machine the manager called him and said, 'Here is one of them.' I said, 'Who operates the still?' and he said, 'Yes.' I said, 'All right, Mr. Heitmann, you are under arrest, come back.' We walked back to where the stills were. I said, 'You know me, don't you, Federal Agent Powers?' He said, 'Yes, Powers,' I said, 'You are under arrest.' He said, 'Can't we fix it up?' Bernhard was coming down the stairs and I said, 'Wait a minute, let us tell Bernhard about it.' We walked over to Bernhard and he said again, 'Can't we fix it up, fellow, I am in a jam'—some remark along that line. Bernhard laughed and I laughed. Walking down to the station he said, 'I am an old ballplayer; I can run.' I said, 'All right, start to run, I have a pocket of rocks, I can throw them at you.' We booked him at the station. I had not arrested him before. In this place, was the property testified to by Agent Bernhard."

On cross-examination, the witness testified as follows: I have not lived in the Mission a long time. I know quite a little about those streets.

(Testimony of E. A. Powers.)
950 Hampshire Street is at the corner of Mariposa and Hampshire Streets. Mariposa is the street between 17th and 18th. This place was right on the corner. I don't think 950 Hampshire Street is between 21st and 22d Streets. I am quite sure I know. Heitmann didn't have a chance to offer me any money. He wanted me to know if he couldn't fix it up and I laughed at him. I didn't see any money. There was no actual tender of money. As soon as he said that I laughed and said, "Here is Bernhard, tell Bernhard [22] about it. "He didn't ask me to let him go upon the payment of money or anything of that kind, just to fix it up. The man who was in charge of the place said, "There is one of them," right in the defendant's presence about three or four feet away. The manager was looking toward me when he said it. We raided that place about two or two-thirty. We left about four or five o'clock. We first saw the defendant that day when he walked in there. I would judge about an hour or three-quarters of an hour after we raided the place. When he saw me he stopped. He walked in the paint-shop and when he saw me he stopped.

Q. He didn't go up to where the stills were at all?

A. He was going in that general direction when he saw me. He did not go upstairs at all when he saw me. The paint-shop, I would not call it a paint-shop. There were men in there fixing and painting ladders.

Q. Was there anything else there to paint?

(Testimony of E. A. Powers.)

A. Very little paint there.

The building on the corner is an old ramshackled building; there is a cluster of buildings there. On Mariposa Street there is an entrance which leads to the back of these buildings. The defendant was downstairs. The stills were upstairs, he didn't have an opportunity to go up there. I was not at the time, where the stills were, and the defendant was not up there. He was not there while I was there at all. I don't remember that the defendant, Heitmann, said anything when the landlord made the remark stated. It is possible that he said something. [23]

TESTIMONY OF I. H. CORY, FOR THE GOVERNMENT.

I. H. CORY, called for the United States, being sworn, testified as follows:

Direct Examination.

K know the defendant, Heitman.

EXCEPTION No. 5.

Mr. McDONALD.—"Did you ever have occasion to arrest him?"

Mr. O'DEA.—"I object to that as immaterial, irrelevant and incompetent, and not the manner in which to prove a case. He can supply evidence —no, he could not even do that—that the defendant was convicted of a felony. This witness would not be permitted to testify in that matter if there are records which can be produced."

(Testimony of I. H. Corey.)

The COURT.—Objection overruled.

Mr. O'DEA.—Exception. [24]

WITNESS.—"Yes, sir."

WITNESS.—(Continuing.) I saw the defendant at a place called Vallimar.

EXCEPTION No. 6.

Mr. McDONALD.—"What was he doing at that time and place?"

Mr. O'DEA.—"The same objection."

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

WITNESS.—(Continuing.) He was in a barn at the time, in Vallimar Canyon, an old barn way up at the head of the canyon. He was there with a man by the name of Lephart, who, I believe, also has been arrested. They were tacking up building paper; in fact, they had tacked up black paper all around this barn, and were preparing it to operate an illicit distillery. They had a large tub there in the center. Evidently it was for a worm tap. There was no worm there and no still there at the time. Agent Toft and I went into the place. He was there with his partner Lephart. They came out and laughed at us and said, "You fellows are just about a week ahead of time."

EXCEPTION No. 7.

Mr. O'DEA.—"I object to this witness testifying to occurrences as to what happened before. This defendant is being tried on information 13,551 and nothing else."

(Testimony of I. H. Corey.)

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

On cross-examination, the witness testified as follows:

We did not go into this house and break down the door without the authorization of a search-warrant. Vallimer is the canyon that comes out into Rockaway Beach.

EXCEPTION No. 8.

Mr. O'DEA.—The defendant was never convicted for that, was he?

WITNESS.—No, he never was arrested. [25]

Mr. O'DEA.—"Then I ask that that be stricken out, your Honor.

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

TESTIMONY OF K. H. KOSS, FOR THE GOVERNMENT.

K. H. KOSS, called for the United States, being sworn, testified as follows:

Direct Examination.

I am a chemist by trade. I reside at 2604–18th Street. I was the manager of the barn at 950 Hampshire Street. I know the defendant, Heitman; he belongs to my lodge. I remember the day Agent Powers came there. He came there quite often. I saw him previous to that date. He came there quite often to see me. He comes to the office quite often, at 2604–18th Street. All

(Testimony of K. H. Koss.)
the buildings are on the same property. I don't mean to say that I saw him in the building on Hampshire Street; I very seldom go there. The buildings are continually locked up. If you want to see me you have to come to 18th and Hampshire Streets. I rented the premises at 950 Hampshire Street where the stills were. I rented it to a fellow named Harris. He represented himself to be Harris. He has hair a little fairer than mine. He had a light suit on. They were going to wash bottles in there. The premises below I rented to a painter. There were stairs that went up from the paint-shop but we took the stairs down and made provision to go up from the yard. They have the bottles there still. They brought 3,000 or 4,000 bottles there to wash. I remember the day that Mr. Powers was there and I remember pointing out Mr. Heitmann to Mr. Powers. I remember telling Mr. Powers, "There is one of them now." Mr. Powers says there were quite a few fellows coming there—well, there is quite a few coming there. This morning I told Mr. Powers to get a subpoena out for me so that the lodge members would not think I came voluntarily to testify against Mr. Heitmann. Mr. Powers told me to come to court. [26]

On cross-examination, the witness testified as follows: The number of that place, I don't really know whether it is 590 or 950. You have me confused, I think it is 590. I have been three years on that property.

(Testimony of K. H. Koss.)

Mr. O'DEA.—"If you were given permission, how long would it take you to find out?"

Mr. McDONALD.—"What is the difference?"

Mr. O'DEA.—"It makes some difference to us."

WITNESS.—"It is 590."

The COURT.—"What difference does it make?"

Mr. O'DEA.—"The information charges him with having an enclosure at 950 Hampshire Street, San Francisco, and it turns out that it is 590."

The COURT. — "What difference does that make?"

Mr. O'DEA.—"There is a variance between the information and the proof."

The COURT.—"The place has been described as a certain place. A misnomer, or wrong number, would not make a particle of difference. There is nothing to that."

WITNESS.—"Your Honor, it is 590."

The COURT.—"Well, I don't care which it is. If there is a still running there, it doesn't make any difference whether it is 590, or 950, or 9500."

Mr. McDONALD.—"That is the Government's case."

EXCEPTION No. 9.

Mr. O'DEA.—"I move for a direct verdict of not guilty on each of the counts, whether there are two or three, because there is not sufficient evidence here to connect the defendant with any of those counts; and on the second ground, there is a material variance between the information and the proof adduced."

(Testimony of K. H. Koss.)

The COURT.—"Motion denied."

Mr. O'DEA.—"Exception. This question of material variance [27] goes to the count charging the defendant with maintaining a nuisance."

The COURT.—"Motion denied."

Mr. O'DEA.—"Exception."

Mr. McDONALD.—"Your Honor, I ask the privilege of reopening the case just for minute, I want to put on the chemist."

Mr. O'DEA.—"We will stipulate that if there was any liquor there, that it was liquor. You don't have to waste time to put on the chemist."

Mr. McDONALD.—"Then I wish to introduce the bottle in evidence and have it marked as our exhibit in evidence."

The COURT.—"All right."

(The bottle was marked U. S. Exhibit 1.)

(Whereupon the defendant, Henry Heitmann, to maintain the issues on his part to be maintained, introduced and offered in evidence the following testimony.)

TESTIMONY OF EDWARD A. O'DEA, ON BEHALF OF THE DEFENDANT.

EDWARD A. O'DEA, called on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination.

On Sunday last with Mr. Heitmann, I saw the place at 950 Hampshire Street, and if there was such a place it would be between 21st and 22d

(Testimony of Edward A. O'Dea.)

Streets, San Francisco. I saw 590 Hampshire Street. It was the paint-shop with the building upstairs described by the witnesses. It was on Hampshire Street, between 17th and 18th Streets. It was 590 Hampshire Street.

EXCEPTION No. 10.

Mr. McDONALD.—"I ask that all of Mr. O'Dea's testimony be stricken out as immaterial."

The COURT.—"Strike it out; it is entirely immaterial." [28]

Mr. O'DEA.—"Exception noted."

TESTIMONY OF HENRY HEITMANN, IN HIS OWN BEHALF.

HENRY HEITMAN, being first duly sworn, testified as follows:

Direct Examination.

I live at 3337–22d Street. I was arrested some time ago by Agent Powers, at 18th and Hampshire Streets, at 590 Hampshire Street. I was not arrested in 950 Hampshire Street. I didn't own the property designed for the manufacture of liquor and certain liquor that Agent Powers accused me of; and I didn't know that they manufactured liquor there. I did not know that property. I did not pay the rental at 590 Hampshire Street. I did not lease those premises from anybody. I was not engaged in manufacturing liquor at 590 Hampshire Street or at the place that Agent Powers said I was near. I was in the neighborhood at the time, I

(Testimony of Henry Heitman.)
visited an old friend of mine, John Koss. He is the witness who was here this morning. I did not visit the place upstairs over the paint-shop. I generally used to visit him in the office; in the little office that he had, and if he was not in the office I used to go to his laboratory. The office was not in the place where the still was found.

Q. Agent Powers has testified here that you said "can't we fix this matter up?"

A. Well, when Agent Powers arrested me I didn't know what to say. I didn't know what I was arrested for. I said, "What are you arresting me for?" and I might have said through the excitement, "Can't we fix it up?" But I didn't mean for bribing or anything like that. I thought I might explain it to him. I never knew there was liquor in the premises to start in with. I didn't go in the upper part of those premises where the still was.

On cross-examination, the witness testified as follows: I am working for Frank Reno; he is a stableman. His place of business is at 245 Precita Avenue. [29]

EXCEPTION No. 11.

Mr. McDONALD.—"How long is it since you left Salada Beach?"

Mr. O'DEA.—"I object to that as immaterial, irrelevant and incompetent and having nothing to do with the issues in this case; and it is prejudicial error on the part of the District Attorney to even suggest anything except as to the issues involved here."

(Testimony of Henry Heitman.)

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

WITNESS.—"About a year ago, I think."

EXCEPTION No. 12.

Mr. McDONALD.—"Why did you leave Salada Beach?"

Mr. O'DEA.—"We object to that also, it has nothing to do with the issues here."

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

WITNESS.—"Because I didn't like it up there any more."

EXCEPTION No. 13.

Mr. McDONALD.—"Why didn't you like it?"

WITNESS.—"Because I didn't."

Mr. McDONALD.—"What happened to you down there?"

Mr. O'DEA.—"We object to that as immaterial, irrelevant and incompetent, not proper cross-examination and involving questions not at issue in this case."

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

WITNESS.—"Well, I tried to start a chicken ranch, but it was too cold out there, it was too foggy."

Mr. O'DEA.—"If the District Attorney may be permitted to ask the defendant question, not to try the defendant upon something else, he should ask him was he ever convicted of a felony. That is all he can do." [30]

(Testimony of Henry Heitman.)

The COURT.—"Objection overruled."

Mr. O'DEA.—Exception.

EXCEPTION No. 14.

Mr. McDONALD.—"You had a still down there, didn't you?"

Mr. O'DEA.—"We object to that as immaterial, irrelevant and incompetent, and not proper cross-examination."

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

Mr. McDONALD.—"You had two 40-gallon stills at Salada Beach, didn't you, Mr. Heitman?"

WITNESS.—"I did not."

EXCEPTION No. 15.

Mr. McDONALD.—"You were fixing up a place to run a still at Valmar, weren't you?"

Mr. O'DEA.—"Object to the question as immaterial, irrelevant and incompetent, and not proper cross-examination, and prejudicial to the defendant."

The COURT.—"Objection overruled."

Mr. O'DEA.—Exception.

WITNESS.—"I did not."

EXCEPTION No. 16.

Mr. McDONALD.—"You didn't have a still at Salada Beach?"

WITNESS.—"I had one one time, yes."

Mr. McDONALD.—"You had two 40-gallon stills?"

WITNESS.—"I don't remember now, it is too long ago."

(Testimony of Henry Heitman.)

Mr. McDONALD.—"What did you mean by telling me you didn't have one?"

WITNESS.—"I thought you meant Miramar."

Mr. McDONALD.—"If your Honor please, I ask that the Marshal get the record in case No. 12613, United States vs. Harry Heitman."

Mr. McDONALD.—"You were arrested down there by Agent Toft, weren't you? [31]

Mr. O'DEA.—"Objected to as immaterial, irrelevant and incompetent, not proper cross-examination and purposeless."

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception."

WITNESS.—"Yes, sir."

(Thereupon the defendant rested, at which time the following proceedings were had:)

EXCEPTION No. 17.

Mr. McDONALD.—"I would like to introduce the record, when it comes here, in that other matter."

Mr. O'DEA.—"I ask that it be introduced now, because I want to object to it."

Mr. McDONALD.—"I introduce the records of this Court in case No. 12,613, United States vs. Henry Heitman, and call particular attention to the defendant's plea of guilty in that case."

Mr. O'DEA.—"We object to that statement, if your Honor please, because it is not based on any evidence at all. He was not asked such a question on the witness-stand. I ask your Honor to so instruct the jury, to disregard it."

The COURT.—"Yes, the jury will disregard it until the record comes. The record is the best evidence."

Mr. McDONALD.—"I offer this record in evidence, if your Honor please."

The COURT.—"Any objection, Mr. O'Dea?"

Mr. O'DEA.—"I object to it on the ground that it is immaterial, irrelevant and incompetent, and it is a prejudicial matter, and has nothing to do with the issues involved in this case."

The COURT.—"Objection overruled."

Mr. O'DEA.—"Exception. At the same time, let all of the record be admitted in evidence, if your Honor please."

The COURT.—"Yes, you can have it all."

Mr. O'DEA.—"Including the defendant's motion to exclude [32] evidence, part of which motion was granted by Judge Van Fleet. I take and exception to the offer."

(Thereupon the said record in the said case number 12,613, United States vs. Harry Heitmann, was received in evidence. That the following is a true copy thereof.)

That on the 12th day of January, 1923 before his Honor William C. Van Fleet, the United States Attorney for the Northern District of California, obtained an order from said Court granting him permission to file an information against one, Henry Heitman and thereupon the Court fixed bonds in the sum of One Thousand Dollars and ordered a bench warrant to issue for the defendant.

That said information was in the words and figures following, to wit:

"In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 12,613.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HITMAN,

Defendant.

INFORMATION.

At the —— term of said court in the year of our Lord one thousand nine hundred and twenty-four.

BE IT REMEMBERED that John T. Williams, United States Attorney for the Northern District of California, by and through Kenneth M. Green, Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 12th day of January, [33] 1923, and with leave of the said Court first having been had and obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this in-

formation is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents: That

HENRY HITMAN

hereinafter called the defendant, heretofore, to wit, on or about the 27th day of November, 1922, at Salada Beach, in the County of San Mateo, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there willfully, and unlawfully have in his possession certain property designed for the manufacture of liquor, to wit:

2 40-gal. stills; 11 50-gal. barrels of mash; several sacks of corn and sugar; empty bottles and barrels

then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act, in the manufacture of intoxicating liquor containing one-half of one per cent and more alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said property by the said defendant was then and there prohibited, unlawful and in violation of Section 25 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statutes of the said United States of *American* in such case made and provided.

SECOND COUNT. [34]

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents: That

HENRY HITMAN

hereinafter called the defendant, heretofore, to wit, on or about the 27th day of November, 1922, at Salada Beach, in the County of San Mateo, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there willfully and unlawfully manufacture, certain intoxicating liquor, to wit:

3 gals. of moonshine brandy,

then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the manufacture of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

THIRD COUNT.

And informant further gives the Court to understand and be informed as follows, to wit: [35]

That allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents: That

HENRY HITMAN

hereinafter called the defendant, heretofore, to wit, on or about the 27th day of November, 1922, at Salada Beach, in the County of San Mateo, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully possess certain intoxicating liquor, to wit,

3 gals. of moonshine brandy

then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of

Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN T. WILLIAMS,
United States Attorney.
KENNETH M. GREEN,
Asst. United States Attorney. [36]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Henry Toft, being first duly sworn deposes and says: That

HENRY HITMAN,

on or about the 27th day of November, 1922, at Salada Beach, County of San Mateo, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there wilfully and unlawfully have in his possession certain property designed for the manufacture of liquor, to wit:

2 40-gal. stills; 11 50-gal. barrels of mash; several sacks of corn and sugar; empty bottles and barrels

then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which

was then and there fit for use for beverage purposes.

That the possession of the said property by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of *Section of* Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

And affiant on his oath aforesaid further deposes and says: That

HENRY HITMAN

on or about the 27th day of November, 1922, at Salada Beach, County of San Mateo, in the —— Division of the Northern District of California, and within the jurisdiction of this Court, did then and there manufacture certain intoxicating liquor, to wit:

3 gals. of moonshine brandy

then and there containing one-half of one per cent and more of [37] alcohol by volume which was then and there fit for use for beverage purposes.

That the manufacture of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

And affiant on his oath deposes and says: That

HENRY HITMAN

on or about the 27th day of November, 1922, at Salada Beach, County of San Mateo, in the Southern

Division and district, aforesaid, did then and there possess certain intoxicating liquor, to wit:

3 gals. of moonshine brandy

then and there containing one-half of one per cent and more of alcohol by volume and fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant at the time and places aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

HENRY TOFT.

Subscribed and sworn to before me this 11th day of January, 1923.

[Seal] C. M. TAYLOR,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Jan. 12, 1923. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [38]

(That thereafter, and on the 24th day of April, 1923, before the Honorable John S. Partridge, the defendant was arraigned and on motion of the attorney for the defendant, the Court ordered said cause continued to the 28th day of April, 1923, to plead.)

(Minutes of court, April 24, 1924.)

(And thereafter, to wit, on the 28th day of April, 1923, before the Honorable William C. Van Fleet, the attorney for the United States and the defend-

ant, without counsel being present, said defendant was called to plead and thereupon said defendant plead not guilty. On motion of the attorney for the United States, the case was continued to May 2, 1923, for trial.)

(Minutes of court, April 28, 1923.)

(That said cause, from time to time, was thereafter ordered continued until the 26th day of June, 1923.) (See Minutes of the Court.)

(That on the 10th day of May, 1923, the defendant, Henry Heitmann, filed a petition for the return of property and exclusion of evidence. Said petition was in the words and figures following, to wit:

"In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 12,613.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HITMAN,

Defendant.

PETITION FOR RETURN OF PROPERTY AND EXCLUSION OF EVIDENCE.

To the Honorable, the Above-entitled Court:

The petition of Henry Hietmann respectfully shows: [39] That he was arrested on the 27th day of November, 1922, and charged with violating the "National Prohibition Act" and that there-

after, and on the 12th day of January, 1923, the United States Attorney, for the Northern District of California, filed an information against him charging him with a violation of said law.

That on the 27th day of November, 1922, your petitioner resided in a six-room dwelling-house at Salada Beach, in the county of San Mateo, State of California; that on said last-mentioned date a man by the name of Bert Poet was visiting him and had stopped there for a period of about two weeks; that the house above described was used on said last-mentioned date for dwelling purposes by your petitioner and his friend, Poet; that your petitioner slept in one room, Poet in another, and the remaining four rooms were used at said time for the accommodation of your petitioner and his friend; that one of said rooms was used as a kitchen in which there were chairs, a table, kitchen utensils, a stove and food; that your petitioner registered for the last general election and gave as his only residence the premises above occupied and that, thereafter, and at the primary and general elections, your petitioner voted in the precinct in the county of San Mateo, of which Salada Beach is a part; that your petitioner procured a certificate of registration which he is filing herewith.

That at the rear of the premises above described there is a barn and barnyard; that in the barnyard the petitioner had chickens, ducks, and pigeons; that said barn and barnyard are connected with said premises and constitute a part of said dwelling.

That on the last-mentioned date, at about the hour of eleven o'clock P. M., your petitioner and his friend, Bert [40] Poet, were asleep in the dwelling-house above described and at said time certain Federal Prohibition Enforcement Officers, illegally and unlawfully, without asking the permission of the petitioner, without the authorization of any search-warrant or order of Court, without a warrant for the arrest of your petitioner or his friend, without his knowledge or consent and in violation of the Fourth and Fifth Amendments to the Constitution of the United States and Section VI of the Act Supplemental to the National Prohibition Act, in violation of Section 25 of the National Prohibition Act and the Act of June 15, 1917, entered the premises of your petitioner, going first to the barn, above described, which at said time was closed, and illegally and unlawfully opened same, and illegally and unlawfully found therein two incomplete stills which the District Attorney describes as two forty-gallon stills which were dismantled at said time, eleven fifty-gallon barrels of mash, several sacks of corn and sugar and some empty barrels and bottles and other property, which they, the said Federal Prohibition Enforcement Officers, illegally and unlawfully, without the authorization of a search-warrant, and in violation of the petitioner's constitutional rights and the laws above mentioned seized and took away with them and they profess to hold the same against the will of your petitioner as evidence of a violation of the law on the part of your petitioner;

that said articles are held without process of law and your petitioner is entitled to their return and to have them excluded from evidence at the trial of said cause.

That thereafter, and on the same date, after the hour of eleven o'clock P. M., long after the sun had set, the above-mentioned Federal Prohibition Enforcement Officers surrounded [41] the dwelling-house of your petitioner, certain of them going to the front door and others remaining in the rear of said dwelling-house; that thereupon certain of said officers pounded on the front door of the petitioner's home, waking your petitioner and Poet, who were in bed and undressed; one of the number called out of the blackness of the night, 'Open the door, we are Federal Officers.' Your petitioner, who was uncertain whether they were criminal marauders or really in fact Federal Prohibition Enforcement Officers asked if they had a search-warrant, to which they made reply that they did not need any and said, 'If you don't open the door we are going to break in,' to which your petitioner replied, 'Wait till I get dressed,' and that thereupon one of their number, whom your petitioner has since been advised was not even a Federal Prohibition Enforcement Officer, but acting under their supervision, illegally and unlawfully opened one of the rear windows and climbed into the petitioner's dwelling-house, and he, illegally and unlawfully, went into said premises, opened the front door and allowed the Prohibition Enforcement Officers to enter; that, at said time, none of said

Prohibition Enforcement Officers had any search-warrant to search the petitioner's home; they had no warrant for his arrest or the arrest of any occupant of said home; they had made no previous purchase of liquor from said premises, no crime was being committed in their presence and your petitioner and his friend were asleep and oblivious to Prohibition Officers' previous acts; that said search was in violation of your petitioner's rights under the Fourth and Fifth Amendments to the constitution of the United States, in violation of Section 25 of the National Prohibition Act, Section VI of the Act Supplemental to the National Prohibition Act, and the Act of June 15, 1917; [42] that as a result of their illegal and unlawful conduct, in their said search, they illegally and unlawfully found in your petitioner's bedroom three gallons of liquid which the United States Attorney terms three gallons of moonshine brandy and that they, the Federal Prohibition Enforcement Officers, illegally and unlawfully, without the authorization of a search-warrant or warrant for the arrest of your petitioner and his friend in the night-time, seized said three gallons of liquid and took same away with them in violation of the Articles of the Constitution and the laws of the United States above set forth, and that the said Prohibition Enforcement Officers profess to hold said liquid as evidence of a violation of the law on the part of your petitioner and that said liquid is held without process of law and he is entitled to its return

and to have same excluded from evidence at the trial of said cause.

That all of said property seized in the premises above described is held without process of law.

That the Prohibition Enforcement Director, the Prohibition Enforcement Agents, and the United States Attorney propose to use said evidence at the trial of the above-entitled cause and that by reason thereof, and the facts set forth, the defendant's rights, under the Fourth and Fifth Amendments to the Constitution of the United States have been and will be violated unless the Court order the return of said articles or their exclusion from evidence at the trial of said cause.

WHEREFORE, the defendant prays that the United States Attorney, Marshal, Clerk and Prohibition Enforcement Officers be notified and the Court direct and order said United States Attorney, Marshal, Clerk and Prohibition Officers either to return said property, destroy same or exclude same and all knowledge derived from same from the trial of said cause.

HENRY HEITMANN,
Petitioner. [43]

EDWARD A. O'DEA,
Attorney for Petitioner.

VERIFICATION.

State of California,
City and County of San Francisco,—ss.

Henry Heitmann, being first duly sworn, deposes and says:

That he is the defendant and the petitioner

named in the above-entitled action; that he has read the foregoing petition for the return of property unlawfully seized and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on his information and belief, and as to those matters that he believes it to be true.

HENRY HEITMANN.

Subscribed and sworn to before me this 2d day of May, 1923.

[Seal] NATHANIEL HASTELL,
Notary Public in and for the City and County of San Francisco, State of California.

STIPULATION.

It is hereby stipulated by and between counsel for the above-mentioned parties that the above-mentioned motion may be heard without further notice from either party on the 21st day of May, 1923, at the hour of 10 o'clock A. M.

Dated: 4/9, 1923.

JOHN T. WILLIAMS,
United States Attorney.

[Endorsed]: Filed May 10, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [44]

EXHIBIT.

CERTIFICATE OF REGISTRATION.

Name: HENRY HEITMAN.
Occupation: Clerk.
Nativity: Germany.

Residence: San Pedro Precinct.
Post Office Address: Salada Beach, Calif.
Affiliate at ensuing Primary Election with Republican Party.
NATURALIZED:
County of San Francisco.
State of California.
Date: November 9, 1910.
Date of Registration: July 29, 1922.
Is able to read the Constitution in the English language.
Is able to write his name and mark his ballot.

State of California,
County of San Mateo,—ss.

I, Elizabeth M. Nash, County Clerk of said County, do hereby certify that the foregoing is a correct transcript of the registration of said Henry Heitman in said County.

ATTEST my hand and the Seal of the Superior Court this 1st day of December, 1922.

[Seal] ELIZABETH M. NASH,
Clerk.
By P. G. Congdon,
Deputy Clerk.

(That on the 26th day of June, 1923, in the min utes of the court appears the following order:)

"Before WILLIAM C. VAN FLEET.

No. 12,613.

UNITED STATES OF AMERICA

vs.

HENRY HITMAN.

Attorney for United States and defendant with his [45] attorney being present. Defendant withdrew his former plea of 'Not Guilty' as to the First Count of the Information filed herein and thereupon plead Guilty as to said First Count. Court ordered that all other Counts of Information be dismissed. Defendant was then called for judgment and after hearing defendant and attorneys, no cause appearing why judgment should not be pronounced, the Court ordered that the defendant, Henry Hitman, for offense of which he stands convicted, pay a fine in the sum of *Found* Hundred ($400.00) Dollars, or in default of payment thereof, defendant be imprisoned in the County Jail, County of San Francisco, State of California, until said fine is satisfied, said term of imprisonment not to exceed beyond period of four (4) months, and that, in event of imprisonment, defendant stand committed to custody of United States Marshal to execute said judgment and that a commitment issue.

After hearing attorney for defendant, the motion for exclusion and return of certain property was withdrawn."

(That thereupon, in the instant case, Mr. McDonald proceeded to make the opening argument for the Government, during which the following proceedings were had:) [46]

EXCEPTION No. 18.

Mr. McDONALD.—"In this case, Gentlemen, we have one of the most flagrant and persistent offenders against the Prohibition Act in this district. He was first apprehended by Agents Toft and Cory at Miramar—

Mr. O'DEA.—For the protection of the defendant's rights, your Honor, if this evidence was admitted for any purpose it was admitted for only one purpose, to show that if he possessed that liquor at this place, or that still, that he possessed it with a guilty knowledge. The District Attorney is not to be permitted to argue the proposition that because this man was arrested once before he is likely to have committed this offense here. I wish to take an exception to the District Attorney's remarks, and assign them as misconduct, and I ask your Honor to instruct the jury and tell the jury that if the evidence is to be considered at all the purpose for which the evidence is to be considered."

The COURT.—"That is just what I will do, Mr. O'Dea. I did not understand Mr. McDonald's opening statement or his argument to go any further than that."

Mr. O'DEA.—"He said, 'We have here one of the most flagrant bootleggers in California,' and that this man was arrested by Agent Cory at such and such a date. That is what I am objecting to."

The COURT.—"What is it you are objecting to, that he is a flagrant bootlegger?"

Mr. O'DEA.—"To that, and to his conclusion that he is a flagrant bootlegger from the fact that he was arrested before."

The COURT.—"Of course, the District Attorney has a perfect [47] right to narrate any evidence that has been admitted to the jury. The statement that he is a flagrant bootlegger is for the jury to determine, and not to be taken from the District Attorney. It will be determined from the evidence in this case. You will be instructed hereafter, Gentlemen, as to the purpose for which evidence of other crimes was admitted. Proceed, Mr. McDonald."

Mr. McDONALD.—"Now, Gentlemen, from those two facts and from the testimony you have heard to-day, from Mr. Powers' statement that he followed him to this place on numerous occasions, saw him there, and that he came in there while the raid was going on, and statements that he made to Mr. Powers at that time, and the statement that he made to Agent Bernhard that he wanted to fix this thing up, I am going to ask you, Gentlemen, what do you think of the case? Do you think there is any question, do you think there is any reasonable doubt that this man was running that still out there on Hampshire Street? It does not make any difference, Gentlemen, whether it was 950, or 590, or what the number was; he was running a still in the Northern District of California, and that is sufficient. You will be so instructed by the Court.

And, Gentlemen, when you consider the evidence, you can only find a verdict of guilty on all the counts in the information in this case."

Mr. O'DEA.—"I didn't wish to interrupt the District Attorney, but now that he is through with his opening argument, I wish to take an exception to the reference, after your Honor had mentioned the matter, to Salada Beach and Miramar as having nothing to do with the issues in this case, and as prejudicial to the rights of this defendant."

The COURT.—"Let the exception be noted."

Mr. O'DEA.—"And I ask your Honor to instruct the jury to disregard that statement of the District Attorney."

The COURT.—"I will instruct them to the best of my ability what the purpose of that testimony is." [48]

(Thereupon, the case was argued by Mr. O'Dea for the defendant and the closing argument was made by Mr. McDonald for the Government during which the following proceedings were had:)

EXCEPTION No. 19.

Mr. McDONALD.—"I am going to ask you to take into consideration his connection with that former case, his prior record, in connection with a still."

Mr. O'DEA.—"I object to that and take an exception to it, and ask your Honor to instruct the jury regarding it."

The COURT.—"Yes, I will instruct the jury in reference to it."

(That thereupon the Court proceeded to instruct the jury in the following words:) [49]

CHARGE TO THE JURY.

The COURT. (Orally.)—Gentlemen of the Jury: You will bear in mind that you at all times are the exclusive judges of the facts; nothing that either counsel say or that the Court says shall be taken as facts by you. While counsel have a right to present their views on the subject, their views of what the evidence proves, you are not bound to nor should you accept that unless it accords with the evidence as you have heard it from the witnesses. In a similar manner, no question that the Court may ask or anything that the Court may say in regard to the testimony is to be taken or accepted by you unless it squares with your idea of what that testimony is.

There has been filed here an information against this defendant and one other; you are not to take the information, itself, as any evidence whatsoever against this defendant; it is a mere matter of form, and the way in which the matter is brought before you for your consideration.

The defendant is presumed to be innocent. That presumption of innocence acts in his favor and accompanies him at all stages of the proceeding; that presumption of innocence would entitle him to a verdict of not guilty at your hands, unless the evidence presented on behalf of the Government satisfies your minds to a moral certainty and beyond all reasonable doubt. By a reasonable doubt is not meant any doubt; a case free from any doubt can rarely ever be presented in a court of justice; but

it means that kind of doubt which would appeal to you as reasonable men in the determination, say, of the most important affairs of your own lives.

The defendant has taken the stand in his own behalf. That, under our system, he is entitled to do. You should weigh his evidence with the same care and by the same token as you would the evidence of any other witness, that is to say, you should weigh his evidence in accordance with his appearance, his manner of testifying, [50] what he says, whether or not his evidence is consistent with itself and consistent with the other evidence in the case, bearing in mind all the time, however, Gentlemen, the interest of the defendant in the outcome of this action.

There appears to be a discrepancy here in the number of the street at which this still was found. You are not to consider that at all. The question as to whether or not it was 950 or 590 is of no concern in this case whatsoever, if you find that a still was actually found there.

The Court has admitted evidence that the defendant has pleaded guilty to the possession of a still upon another occasion at Salada Beach. You are to take that evidence into consideration, Gentlemen, only in your determination of the first count or charge in the complaint; that first count charges that the defendant here had in his possession jackass brandy and other things for the purposes of sale, and that in that he maintained a common nuisance. The so-called Volstead Act provides that where a man has in his possession alcoholic liquor

for the purpose of sale, that constitutes a nuisance. That evidence *has* introduces merely as bearing upon the question as to whether or not, if you find that this liquor was in the possession of this defendant, whether he had it there for a commercial purpose or for his own use. Under such circumstances, however, the law presumes that where a man has liquor in his possession he has it for purposes of sale; that i*t* to say, if you are found with liquor in your possession in any other place than your private house, that constitutes *prima facie* evidence that you had it for sale. Therefore, on the first count, if you determine that he did have liquor in his possession, you are likewise to determine whether he had it for sale.

The second and third counts, Gentlemen, are practically identical; they charge that he had in his possession certain stills and other property designed for the manufacture of liquor. If you [51] find that they were actually in the possession of this defendant, or under his control in any manner whatsoever, or if he was any party to having them in possession, then you must find him guilty upon those counts.

I*f* i*t* not necessary to establish that they were actually in his physical possession; if you believe that he had anything to do with them to the extent that they were under his control, or that he was engaged in their operation, or anything of that particular and immediate thought, then you must find him guilty upon that count.

Evidence has been admitted also that at the time of his arrest this defendant stated to the officers something to the effect that he was in a tight place, or something of that sort, and would like to fix it up. If you believe that evidence, Gentlemen, then you must determine in your own minds whether or not by that the defendant meant that he desired to bribe the officers, or whether he meant, as he testified, merely some way by which he could establish to them that he had nothing to do with the still and the other properties. If you find, however, that the intent and purpose of what he said was to bribe the officers, then I instruct you that evidence of an attempted bribe is evidence of the guilt of the defendant.

The man who is charged here with Mr. Heitmann has not been apprehended, and so you will not find any verdict as to him.

As to the defendant, Heitmann, you must find him guilty or not guilty upon each one of the three counts. However, the second and the third counts are practically the same, merely describing different parts of the property, so that the second and third counts are to be treated, if there was any crime committed, merely as one crime, and not two.

I will require an unanimous verdict at your hands. [52]

EXCEPTION No. 20.

(At the conclusion of the Court's charge and before said cause was submitted to the jury, counsel for the defendant addressed the Court and took

exception to part of said charge, in the following language:)

Mr. O'DEA.—"To protect the record, your Honor, I wish to take an exception to the remark your Honor made that it made no difference whether the house was numbered 950 or 590."

EXCEPTION No. 21.

(At the conclusion of the Court's charge and before the cause was submitted to the jury, the defendant took exception in open court to the Court's refusal to give an instruction. The proceedings and instruction were as follows:

Mr. O'DEA.—"I wish to take an exception to your Honor's refusal to give requested instruction regarding difference of number of premises whether same was 590 or 950. The instruction was as follows:

If you find from the evidence that liquor was not kept for sale at 950 Hampshire Street, in the city and county of San Francisco, State of California, then you must acquit the defendant of the charge contained in the information of maintaining a common nuisance in violation of Section 21, of Title II of the 'National Prohibition Act.'

The COURT.—Yes, Mr. O'Dea. You may retire, Gentlemen."

(Whereupon, the jury retired at 2:10 P. M. on said last-mentioned date, and subsequently at 3:15 P. M. returned into court and rendered the verdict finding the defendant guilty on the first count, guilty on the second count and guilty on the third count.)

(That thereupon the Court arraigned the defendant for judgment at which time the defendant made a motion for a new trial which was by the Court denied on April 16, 1924, and to the Court's order denying said motion [53] the defendant, then and there, duly excepted.)

(Whereupon the defendant made a motion in arrest of judgment which was ordered by the Court denied on April 16, 1924, and to which order of the Court, the defendant, then and there, duly excepted.)

(Whereupon the Court rendered its sentence and judgment upon the defendant and granted to the defendant by order of the Court based upon the stipulations of the parties extensions of time in which to lodge and settle his proposed bill of exceptions. That said proposed bill of exceptions was lodged on the 28th day of August, 1924.)

That said defendant hereby presents the foregoing as his bill of exceptions and respectfully asks that the same be allowed, signed, sealed and made a part of the record in this case.

Dated October 9, 1924.

EDWARD A. O'DEA,
Attorney for Defendant. [54]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMANN,

Defendant.

NOTICE OF PRESENTATION OF BILL OF EXCEPTIONS.

To Sterling Carr, United States Attorney, and Thomas J. Sheridan, Assistant United States Attorney:

You will please take notice that the foregoing constitutes and is the bill of exceptions of the defendant in the above-entitled cause, and the said defendant will apply to the said Court to allow said bill of exceptions and to sign and seal the same as the bill of exceptions herein.

EDWARD A. O'DEA,
Attorney for the Defendant. [55]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMANN,

Defendant.

STIPULATION RE BILL OF EXCEPTIONS.

It is hereby stipulated and agreed that the foregoing bill of exceptions is correct and that the same may be signed, settled, allowed and sealed by the Court.

Dated: October 9, 1924.

STERLING CARR,

S.,

United States Attorney.

EDWARD A. O'DEA,

Attorney for Defendant. [56]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMANN,

Defendant.

ORDER SETTLING BILL OF EXCEPTIONS.

This bill of exceptions having been duly presented to the Court within the time allowed by law and the rules of the Court and within the time extended by the Court by orders duly and regularly made, is now signed, sealed and made a part of the records in this case, and is allowed as correct.

Dated: October 11th, 1924.

JOHN S. PARTRIDGE,
United States District Judge.

[Endorsed]: Filed October 14, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [57]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

THE UNITED STATES OF AMERICA
vs.
HENRY HEITMAN.

(VERDICT.)

We, the jury, find Henry Heitman, the defendant at the bar, Guilty on 1st Count; Guilty on 2d Count; Guilty on 3d Count.

A. F. BLOCK,
Foreman.

[Endorsed]: Filed April 16, 1924, at 3 o'clock and 15 minutes P. M. Walter B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [58]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
HENRY HEITMAN,
Defendant.

MOTION FOR A NEW TRIAL.

Now comes Henry Heitman, defendant in the above-entitled cause and by Edward A. O'Dea, Esq., his attorney, moves the Court to set aside the verdict rendered herein and to grant a new trial of said cause and for reasons therefor, shows to the Court, the following:

I.

That the verdict in said cause is contrary to law.

II.

That the verdict in said cause was not supported by the evidence in the case.

III.

That the evidence in said cause is insufficient to justify said verdict.

IV.

That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial which errors were duly excepted to. [59]

V.

That the Court improperly instructed the jury to defendant's prejudice.

VI.

That the United States Attorney was guilty of misconduct which was prejudicial to the defendant's rights.

Dated at San Francisco, California, this 16th day of April, 1924.

———————————,
Defendant.

EDWARD A. O'DEA,
Attorney for Defendant.

Due service of the within motion for new trial is hereby admitted this 17th day of April, 1924.

JOHN T. WILLIAMS,
U. S. Atty.

[Endorsed]: Filed Apr. 17, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [60]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY HEITMANN,
Defendant.

MOTION IN ARREST OF JUDGMENT.

Now comes the defendant, Henry Heitman, and respectfully moves this Court to arrest and withhold judgment in the above-entitled cause and that the verdict of conviction of said defendant heretofore given and made in the said cause be vacated

and set aside and declared to be null and void for each of the following causes and reasons:

I.

That Count One of the Information filed herein does not charge or state facts sufficient to constitute a public offenses under the laws of the United States against this defendant.

II.

That Count Two of the Information filed herein does not charge or state facts sufficient to constitute a public offenses under the laws of the United States against this defendant.

III.

That Count Three of the Information filed herein does not charge or state facts sufficient to constitute a [61] public offense under the laws of the United States against this defendant.

IV.

That this Court has no jurisdiction to pass judgment upon the defendant by reason of the fact that Counts One, Two and Three of the Information on file herein do not state public offenses under the laws of the United States.

WHEREFORE by reason of the premises, the defendant prays this Honorable Court that the judgment herein be arrested and withheld and the conviction of the defendant be declared null and void.

Dated: April 16, 1924.

———————,

Defendant.

EDWARD A. O'DEA,

Attorney for Defendant.

[Endorsed]: Filed Apr. 17, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [62]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

THE UNITED STATES OF AMERICA

vs.

HENRY HEITMAN.

JUDGMENT ON VERDICT OF GUILTY.

J. F. McDonald, Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the information filed on the 13th day of June, 1923, charging him with the crime of violating National Prohibition Act of his arraignment and plea of not guilty; of his trial and the verdict of the jury on the 16th day of April, 1924, to wit:

We, the jury, find Henry Heitman the defendant at bar, Guilty on 1st Count, Guilty on 2d Count, Guilty on 3d Count.

A. F. BLOCK,
Foreman.

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment;

THAT, WHEREAS, the said Henry Heitman, having been duly convicted in this court of the crime of violating National Prohibition Act;

IT IS THEREFORE ORDERED AND ADJUDGED that the said [63] Henry Heitman be imprisoned for the period of one (1) year, and he pay a fine in the sum of Five Hundred ($500) Dollars; further ordered that in default of the payment of said fine that said defendant be imprisoned, until said fine be paid or until he be otherwise discharged in due course of law. Further ordered that said term of imprisonment be executed upon said defendant by imprisonment in the County Jail, County of San Francisco, California.

Judgment entered this 16th day of April, A. D. 1924.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 16, Judg. and Decrees, at page 280. [64]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMANN,

Defendant.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS.

Now comes Henry Heitman, defendant herein, by Edward A. O'Dea, Esq., his attorney, and says that on the 16th day of April, 1924, this Court rendered judgment herein against the defendant in which judgment and the proceedings had prior thereto in this cause, certain errors were permitted to the prejudice of the defendant all of which errors will more fully appear from the assignment of errors which is filed with this petition.

WHEREFORE, the defendant prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and that a transcript of the record in this cause, duly authenticated, may be sent to the *Circuit of*

Appeals, aforesaid, and that this defendant be awarded a supersedeas upon said judgment and all necessary and proper process including bail. [65]

Dated: May 6, 1924.

HENRY HEITMAN,
Defendant.

EDWARD A. O'DEA,
Attorney for Defendant.

Due service of the within petition for writ of error and supersedeas is hereby admitted this 6th day of May, 1924.

JOHN T. WILLIAMS,
U. S. Atty.

[Endorsed]: Filed May 7, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [66]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY HEITMAN,
Defendant.

ASSIGNMENT OF ERRORS.

Henry Heitman, defendant in the above-entitled cause, and plaintiff in error herein, having peti-

tioned for an order from said Court permitting him to procure a writ of error to this Court, directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence entered in said cause against Henry Heitman, now makes and files with his said petition the following assignment of errors herein, upon which he will apply for a reversal of said judgment and sentence upon the said writ, and which said errors and each of them, are to the great detriment, injury and prejudice of the said defendant and in violation of the rights conferred upon him by law; and he says that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof in the District Court of the United States, for the Northern District of California, there is manifest error in this, to wit:

I.

The Court erred in permitting the United States Attorney over the objection of the defendant to keep two [67] witnesses for the Government in the courtroom at the same time before either had testified and after the Court had ordered all witnesses excluded except the one designated by the United States Attorney to remain with him during the trial. That the proceedings, objection and exceptions upon this subject were as follows:

Mr. O'DEA.—If your Honor please, at this time I ask that the witnesses be excluded.

The COURT.—All witnesses on both sides will be

excluded except the one designated by the District Attorney to remain with him during the trial.

Mr. O'DEA.—We have only the defendant.

Mr. McDONALD.—We ask to have Agent Powers remain here.

Mr. O'DEA.—Then I ask that Agent Powers be put on the stand first.

The COURT.—I cannot direct the order of proof on the part of the Government, Mr. O'Dea.

Mr. O'DEA.—Then that will defeat the purpose of my motion. I don't want these witnesses testifying to the same thing simply because one listens to the other.

The COURT.—You know, Mr. O'Dea, the rule is that the Government is entitled to designate one officer who may remain in the room. I cannot control the order in which they shall take the stand. However, I think there will be no objection to putting Mr. Powers on first.

Mr. McDONALD.—Your Honor, I want to put Mr. Bernhard on first.

The COURT.—Then I cannot control that. I am bound by the statute in the matter. [68]

Mr. O'DEA.—Exception.

The defendant and plaintiff in error assigns the Court's action as an abuse of discretion on the Court's part, defeating the purpose of the motion, of plaintiff in error and defendant.

II.

The Court erred in admitting in evidence over the objection of the defendant, testimony that the defendant had been arrested on another offense

prior to the date alleged in the information. That J. Bernhard, a witness for the Government, was asked the following question by the United States Attorney: "Do you know the defendant, Heitman, outside of this occasion?" and the additional question, "Had you arrested him before?" to which question the defendant and plaintiff in error objected specifying his grounds of objection as follows: That the same were incompetent, irrelevant and immaterial and that there was nothing involved which would authorize the United States Attorney to elicit the information sought and that same was prejudicial error on the part of the United States Attorney. To which the witness replied, "I did. Well, no, I was not one of the arresting officers, but I came there afterwards, after he was arrested."

To the Court's order overruling said objection, the defendant then and there duly excepted, and it was stipulated between the Court and counsel that defendant have an objection and exception to that whole line of testimony.

III.

The Court erred in refusing to grant the motion of defendant and plaintiff in error to strike out the following testimony, E. A. Powers, a witness for the Government, testified [69] as follows: "For the period of about six or seven weeks, I had been following Mr. Heitman on account of remarks *on account of remarks* he made around town and it led me into the vicinity of— "

To the Court's order denying said motion, defendant and plaintiff in error duly excepted.

IV.

The Court erred in overruling the objection of the defendant and plaintiff in error to questions asked Federal Agent I. H. Cory, a witness for the Government, and the testimony elicited therefrom: Said question was as follows: "Did you ever have occasion to arrest him?" The question was objected to by the defendant and plaintiff in error on the ground that it was incompetent, irrelevant and immaterial. The only question permitted on said subject would be: "Was the defendant ever convicted of a felony?" The witness answered in the affirmative and the objection was by the Court overruled, to which the defendant then and there duly excepted.

V.

The Court erred in overruling the objection of the defendant and plaintiff in error to questions asked Federal Agent I. H. Cory, a witness for the Government, and the testimony elicited therefrom. Said questions were as follows: "Did you ever meet the defendant at a place called Valmar?" and "What was he doing at that time and place?" That the defendant raised the same objection as those specified in assignment of error No. 4 and the Court overruled said objections. To which defendant and plaintiff in error then and there duly excepted. The testimony elicited was highly prejudicial to the defendant and was as follows: [70]

> "He was in a barn at the Valmar Canyon, an old barn away up at the head of the canyon. He was there with a man by the name of Lep-

hardt, who I believe also was arrested. They were tacking up building paper; in fact, they had tacked up black paper all around this barn, and were preparing it to operate an illicit distillery. They had a large tub there in the center. Evidently, it was for a worm tap. There was no worm and no still there at the time. Agent Toft and I went into the place. He was there with his partner, Lephardt. They came out and laughed at us and said, 'You fellows are just about a week ahead of time.' "

VI.

The Court erred in denying the motion of the defendant and plaintiff in error to strike out the testimony given by Federal Agent I. H. Cory, a witness for the Government, as set forth in specification 5 of this assignment of errors when defendant had ascertained by cross-examination of said witness that the defendant was never convicted nor even arrested for any offense set forth in said fifth specification of error. To the Court's order denying said motion defendant and plaintiff in error duly excepted.

VII.

The erred in denying the motion of defendant and plaintiff in error for a directed verdict of not guilty made at the conclusion of the Government's case because there was not sufficient evidence to convict the defendant of any of the counts set forth in the information, and upon the further ground that there was a material variance between the [71] information and the proof adduced.

The information alleged that a nuisance was maintained at 950 Hampshire Street, San Francisco, and there was proof to show that if an offense was committed it was committed at 590 Hampshire Street, San Francisco.

To the Court's order denying said motion, the defendant and plaintiff in error duly excepted.

VIII.

The Court erred in granting the motion of the Government to strike out the following testimony on the ground that it was immaterial. Said testimony was given by Edward A. O'Dea, Esq., attorney for the defendant and plaintiff in error as a witness for the defendant and plaintiff in error. Said testimony was as follows:

> "On Sunday last, with Mr. Heitman, I saw a place at 950 Hampshire Street and if there was such a place it *would between* 21st and 22d Streets, San Francisco. I saw 590 Hampshire Street. It was the paint-shop, with the building described by the witnesses and it was on Hampshire Street, between 17th and 18th.

To the Court's order granting said motion defendant and plaintiff in error duly excepted.

IX.

The Court erred in overruling the objections of the defendant and plaintiff in error to questions asked the defendant and plaintiff in error on cross-examination by the United States Attorney when he was a witness testifying in his own behalf. The subject matter of said question was a previous

arrest at Salada Beach for having a "still." Said questions were objected to on the ground that they were incompetent, irrelevant and immaterial, not proper cross-examination, involving questions not at issue in the case; that they constituted prejudicial error on the part of the United [72] States Attorney and that the only question permitted on such a subject would be, "Was the defendant ever convicted of a felony?"

To the Court's orders overruling said objections, plaintiff in error and defendant duly took appropriate exceptions.

X.

The Court erred in admitting in evidence, over the objection of the defendant and plaintiff in error, the records of the United States District Court in case number 12,613 entitled "United States vs. Henry Heitman," the United States Attorney calling particular attention to the defendant's plea of guilty in that case. (The record showed that United States District Judge Van Fleet granted a motion excluding evidence to three counts in said information, and denied the motion in one count, to wit, having property in his possession designed for the unlawful manufacture of liquor. To this count the defendant had pleaded guilty.) The defendant's objection was upon the ground that the evidence was incompetent, irrelevant and immaterial and contained prejudicial matter which had nothing to do with the issues involved in the instant case.

To the Court's order overruling said objection, defendant and plaintiff in error duly excepted.

XI.

The United States Attorney was guilty of misconduct which was highly prejudicial to the rights of the defendant when in his argument to the jury at the close of the case he made certain remarks, which remarks were excepted to [73] by the defendant at the time, assigned as misconduct and the Court was requested by the defendant to instruct the jury to disregard said remarks. Said remarks, exceptions, assignment of misconduct, request of the Court and instruction by the Court were as follows:

Mr. McDONALD.—"In this case, Gentlemen, we have one of the most flagrant and persistent offenders against the Prohibition Act in this district. He was first apprehended by Agents Toft and Cory at Miramar—

Mr. O'DEA.—For the protection of the defendant's rights, your Honor, if this evidence was admitted for any purpose it was admitted for only one purpose, to show that if he possessed that liquor at this place, or that still, that he possessed it with a guilty knowledge. The District Attorney is not to be permitted to argue the proposition that because this man was arrested once before he is likely to have committed this offense here. I wish to take an exception to the District Attorney's remarks, and assign them as misconduct, and I ask your Honor to instruct the jury and tell the jury that if the evidence is to be considered at all the purpose for which the evidence is to be considered.

The COURT.—That is just what I will do, Mr. O'Dea. I did not understand Mr. McDonald's

opening statement or his argument to go any further than that.

Mr. O'DEA.—He said, "We have here one of the most flagrant bootleggers in California," and that this man was arrested by Agent Cory at such and such a date. That is what I am objecting to.

The COURT.—What is it you are objecting to, that he is a flagrant bootlegger? [74]

Mr. O'DEA.—To that, and to his conclusion that he is a flagrant bootlegger from the fact that he was arrested before.

The COURT.—Of course, the District Attorney has a perfect right to narrate any evidence that has been admitted to the jury. The statement that he is a flagrant bootlegger is for the jury to determine, and not to be taken from the District Attorney. It will be determined from the evidence in this case. You will be instructed hereafter, Gentlemen, as to the purpose for which evidence of other crimes was admitted. Proceed, Mr. McDonald." The Court afterwards, on this subject, gave this instruction:

The Court has admitted evidence that the defendant has pleaded guilty to the possession of a still upon *an* another occasion at Salada Beach. You are to take that evidence into consideration, Gentlemen, only in your determination of the first count or charge in the complaint; that first count charges that the defendant here had in his possession jackass brandy and other things for the purpose of sale, and that in that he maintained a common nuisance. The so-called Volstead Act provides that where a man has in his possession alcoholic liquor for the

purpose of sale, that constitutes a nuisance. That evidence was introduced merely as bearing upon the question as to whether or not, if you find that this liquor was in the possession of this defendant, whether he had it there for commercial purposes or for his own use. Under such circumstances, however, the law presumes where a man has liquor in his possession he has it for purposes of sale; that is to say, if you are found with liquor in your possession in any other place than your [75] private house, that constitutes *prima facie* evidence, that you had it for sale. Therefore, on the first count, if you determine that he did have liquor in his possession, you are likewise to determine whether he had it for sale."

XII.

The United States Attorney was guilty of misconduct which was highly prejudicial to the rights of the defendant when in his argument to the jury at the close of the case he made certain remarks, which remarks were excepted to by the defendant at the time, assigned as misconduct, and the Court was requested by the defendant to instruct the jury to disregard said remarks. Said remarks, exceptions, assignments of misconduct, request of the Court, and instruction by the Court were as follows:

Mr. McDONALD.—"Now, Gentlemen, from those two facts and from the testimony you have heard to-day, from Mr. Powers' statement that he followed him to this place on numerous occasions, saw him there, and that he came in there while the raid was going on, and statements that he made to

Mr. Powers at that time, and the statement that he made to Agent Bernhard that he wanted to fix this thing up, I am going to ask you, Gentlemen, what do you think of the case? Do you think there is any question, do you think there is any reasonable doubt that this man was running that 'still' out there on Hampshire Street? It does not make any difference, Gentlemen, whether it was 950 or 590 or what the number was; he was running a still in the Northern District of California, and that is sufficient. You will be so instructed by the Court. And, Gentlemen, when you consider that evidence, you can only find a verdict of guilty on all the counts in the information in [76] this case.

Mr. O'DEA.—I didn't wish to interrupt the District Attorney, but now that he is through with his opening argument, I wish to take an exception to the reference, after your Honor had mentioned the matter, to Salada Beach and Miramar as having nothing to do with the issues in this case, and as prejudicial to the rights of this defendant.

The COURT.—Let the exception be noted.

Mr. O'DEA.—And I ask your Honor to instruct the jury to disregard that statement of the District Attorney.

The COURT.—I will instruct them to the best of my ability what the purpose of that testimony is."

(Thereafter, the Court in its instructions to the jury upon the subject here under discussion gave

only the instruction set forth in plaintiff in error's specifications of error No. XI.)

XIII.

The United States Attorney was guilty of misconduct which was highly prejudicial to the rights of the defendant when in his argument to the jury in reply to counsel for the defendant's argument to the jury he closed same with certain remarks; which remarks were excepted to by the defendant at the time, assigned as misconduct and the Court was requested by the defendant to instruct the jury to disregard said remarks. Said remarks, exceptions, assignment of misconduct, request of the Court and instruction by the Court were as follows:

Mr. McDONALD.—"I am going to ask you to take into consideration his connection with that former case, his prior record, in connection with a still. [77]

Mr. O'DEA.—I object to that and take an exception to it, and ask your Honor to instruct the jury regarding it.

The COURT.—Yes, I will instruct the jury in reference to it."

(Thereafter the Court in its instruction to the jury upon the subject here under discussion gave only the instruction set forth in plaintiff in error's assignment of errors No. XI.)

XIV.

The Court erred in giving the following instruction over the objection of the defendant and plaintiff in error to which instruction, defendant and plaintiff in error duly excepted:

"There appears to be a discrepancy here in the number of the street at which this still was found. You are not to consider that at all. The question as to whether or not it was 950 or 590 is of no concern in this case whatsoever, if you find that a still was actually found there."

XV.

The Court erred in refusing to give the following instruction requested by defendant and plaintiff in error:

"If you find from the evidence that liquor was not kept for sale at 950 Hampshire Street, in the city and county of San Francisco, State of California, then you must acquit the defendant of the charge contained in the information of maintaining a common nuisance in violation of Section 21, of Title II of the National Prohibition Act."

To the Court's refusal to give said instruction plaintiff in error and defendant duly excepted.

HENRY HEITMAN,
Defendant. [78]

EDWARD A. O'DEA,
Attorney for Defendant.

Due service of the within assignment of errors is hereby admitted this 6th day of May, 1924.

JOHN T. WILLIAMS,
United States Attorney.

[Endorsed]: Filed May 7, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [79]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 13,551.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY HEITMAN,

Defendant.

ORDER ALLOWING WRIT OF ERROR AND SUPERSEDEAS.

The writ of error and the supersedeas herein prayed for by Henry Heitman, defendant and plaintiff in error, pending the decision upon said writ of error, is hereby allowed and the defendant is admitted to bail upon the writ of error in the sum of Three Thousand and No/100 ($3,000.00) Dollars.

The bond for costs of the writ of error is hereby fixed at Two Hundred Fifty and No/100 ($250.00) Dollars.

Dated at San Francisco, California, this 7th day of May, 1924.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed May 7, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [80]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 80 pages, numbered from 1 to 80, inclusive, contain a full, true and correct transcript of the records and proceedings, in the case of United States of America vs. Henry Heitman, No. 13,551, as the same now remain on file and of record in this office; said transcript having been prepared in accordance with the praecipe (copy of which is embodied herein).

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of thirty-one dollars and fifteen cents ($31.15) and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error, return to writ of error, and original citation on writ of error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court this 8th day of November, A. D. 1924.

[Seal] WALTER B. MALING,
Clerk.

By C. M. Taylor,
Deputy Clerk. [81]

WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Henry Heitmann, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Henry Heitmann, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that er-

ror, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 11th day of October, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By C. W. Calbreath,
Deputy.

Allowed by:

JOHN S. PARTRIDGE,
District Judge.

Rec'd 10/14/24.

STERLING CARR,
S.,
U. S. Atty.

[Endorsed]: No. 13,551. United States District Court for the Northern District of California. Henry Heitmann, Plaintiff in Error, vs. United States of America, Defendant in Error. Original Writ of Error. Filed Oct. 14, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [82]

RETURN TO WRIT OF ERROR.

The answer of the Judges of the United States District Court, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain

schedule to this writ annexed, the record and all procedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 14th day of October, A. D. 1924, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,

Clerk U. S. District Court, Northern Dist. of Calif.

By C. M. Taylor,
Deputy Clerk. [83]

CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, and to Sterling Carr, Esq., United States Attorney, and to Thomas J. Sheridan, Esq., Assistant to the United States Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's

Office of the United States District Court for the Northern District of California, wherein Henry Heitmann is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 11th day of October, A. D. 1924.

JOHN S. PARTRIDGE,
United States District Judge.

Due service of the within citation and the receipt of a copy thereof is hereby admitted this 14th day of October, 1924.

STERLING CARR,
United States Attorney.

[Endorsed]: No. 13,551. United States District Court for the Northern District of California. Henry Heitmann, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error (Original). Filed Oct 14, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [84]

[Endorsed]: No. 4393. United States Circuit Court of Appeals for the Ninth Circuit. Henry Heitman, Plaintiff in Error, vs. United States of

America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed November 11, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

14

No. 4393

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY HEITMAN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD A. O'DEA,
Phelan Building, San Francisco,
Attorney for Plaintiff in Error.

FILED
MAR 19 1925
F. D. MONCKTON,
CLERK

No. 4393

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY HEITMAN,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

The plaintiff in error was charged by information with one, J. Harris, with violations of the National Prohibition Act. The information contained three counts. The first count charged plaintiff in error and the said J. Harris with having maintained a common nuisance on or about the 4th day of June, 1923, at 950 Hampshire Street, in the City and County of San Francisco, in the Southern Division of the Northern District of California, in that they did then and there, wilfully and unlawfully keep for sale on the premises aforeaid certain intoxicating liquor, to-wit, two 120-gal. stills; four burners; two pressure tanks; tanks; five 500-gal. vats; three hydrometers; three thousand gallons of mash; 100

gallons of what is called jackass brandy; then and there containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes. That the keeping for sale of the said intoxicating liquor by plaintiff in error and J. Harris was in violation of Section 21 of Title II of the National Prohibition Act.

The second count charged the plaintiff in error and J. Harris on the last mentioned date, at the above mentioned place, with wilfully and unlawfully possessing certain intoxicating liquor, to-wit, two 120-gal. stills; four burners; two pressure tanks; tanks; five 500-gal. vats; three hydrometers; three thousand gallons of mash; 100 gallons of what is called jackass brandy; then and there containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes. That the possession of said intoxicating liquor by plaintiff in error and J. Harris was prohibited, unlawful and in violation of Section 3 of Title II of the National Prohibition Act.

The third count charged the plaintiff in error and the said J. Harris with having in their possession, on the last mentioned date, at the above mentioned place, certain property designed for the manufacture of intoxicating liquor, to-wit, four burners; two pressure tanks; five 500-gal. vats; three hydrometers; three thousand gallons of mash; 100 gallons of what is called jackass brandy which was then and there intended for use in violating Title II of the

National Prohibition Act in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes. The information alleged that the possession of the said property by the said defendants at the time and place aforesaid was prohibited, unlawful and in violation of Section 3 of the National Prohibition Act. (Trans. Rec. pages 2 to 9.)

The information was filed by the United States Attorney on the 13th day of June, 1923. On the 14th day of June, 1923, plaintiff in error was arraigned and pleaded not guilty to each of the counts set forth in the information and the cause was continued to the 16th day of June, 1923, to be set for trial. (Trans. Rec. page 10.) The defendant, Harris, did not appear at said time and was not apprehended thereafter and will be no longer considered in any of these proceedings.

On the 16th day of April, 1924, plaintiff in error was tried before a jury and on said day the jury returned a verdict finding the plaintiff in error guilty on all of the counts set forth in the information. Said verdict was as follows:

> "We, the jury, find Henry Heitman, the defendant at bar, Guilty on 1st count; Guilty on 2d count; and Guilty on 3d count." (Trans. Rec. page 13.)

On the trial of the cause, plaintiff in error took certain exceptions to the rulings of the Court on

evidence, to the Court's charge, to its refusal to give certain instructions requested by plaintiff in error, to the conduct of the United States Attorney and to the United States Attorney's prejudicial remarks made in his argument to the jury which plaintiff in error asked the Court to instruct the jury to disregard, and which the Court did not so do. The points so raised are set forth with particularity in plaintiff in error's specifications of error relied upon in the next subdivision of this brief.

On the same day, to-wit, the 16th day of April, 1924, plaintiff in error interposed a motion for a new trial; also a motion in arrest of judgment, each of which were by the Court denied. (Trans. Rec. pages 13, 68 and 69.) Whereupon the Court sentenced plaintiff in error to imprisonment for a period of one year in the County Jail, County of San Francisco, State of California, and that he pay a fine in the sum of five hundred and no/100 dollars or in default of payment thereof he be further imprisoned until said fine be paid or he be otherwise discharged by due process of law. (Trans. Rec. page 13.)

A writ of error was thereafter sued out by plaintiff in error to review the judgment and proceedings of the trial Court.

II.

SPECIFICATIONS OF THE ERRORS RELIED UPON.

I.

The Court erred in admitting in evidence over the objection of the defendant, testimony that the defendant had been arrested on another offense prior to the date alleged in the information. That J. Bernhard, a witness for the Government, was asked the following question by the United States Attorney: "Do you know the defendant, Heitman, outside of this occasion?" and the additional question, "Had you arrested him before?" to which question the defendant and plaintiff in error objected specifying his grounds of objection as follows: That the same were incompetent, irrelevant and immaterial and that there was nothing involved which would authorize the United States Attorney to elicit the information sought and that same was prejudicial error on the part of the United States Attorney. To which the witness replied, "I did. Well, no, I was not one of the arresting officers, but I came there afterwards, after he was arrested."

To the Court's order overruling said objection, the defendant then and there duly excepted, and it was stipulated between the Court and counsel that defendant have an objection and exception to that whole line of testimony.

II.

The Court erred in refusing to grant the motion of the defendant and plaintiff in error to strike out

the following testimony, E. A. Powers, a witness for the Government, testified as follows: "For the period of about six or seven weeks, I had been following Mr. Heitman on account of remarks he made around town and it led me into the vicinity of—"

To the Court's order denying said motion, defendant and plaintiff in error duly excepted.

III.

The Court erred in overruling the objection of the defendant and plaintiff in error to questions asked Federal Agent I. H. Cory, a witness for the Government, and the testimony elicited therefrom: Said question was as follows: "Did you ever have occasion to arrest him?" The question was objected to by the defendant and plaintiff in error on the ground that it was incompetent, irrelevant and immaterial. The only question permitted on said subject would be: "Was the defendant ever convicted of a felony?" The witness answered in the affirmative and the objection was by the Court overruled, to which the defendant then and there duly excepted.

IV.

The Court erred in overruling the objection of the defendant and plaintiff in error to questions asked Federal Agent I. H. Cory, a witness for the Government, and the testimony elicited therefrom. Said questions were as follows: "Did you ever meet

the defendant at a place called Valmar?" and "What was he doing at that time and place?" That the defendant raised the same objection as those specified in assignment of error No. 4 and the Court overruled said objections. To which defendant and plaintiff in error then and there duly excepted. The testimony elicited was highly prejudicial to the defendant and was as follows:

> "He was in a barn at the Valmar Canyon, an old barn away up at the head of the canyon. He was there with a man by the name of Lephardt, who I believe also was arrested. They were tacking up building paper; in fact, they had tacked up black paper all around this barn, and were preparing it to operate an illicit distillery. They had a large tub there in the center. Evidently, it was for a worm tap. There was no worm and no still there at the time. Agent Toft and I went into the place. He was there with his partner, Lephardt. They came out and laughed at us and said, 'You fellows are just about a week ahead of time.'"

V.

The Court erred in denying the motion of the defendant and plaintiff in error to strike out the testimony given by Federal Agent I. H. Cory, a witness for the Government, as set forth in specification 5 of this assignment of errors when defendant had ascertained by cross-examination of said witness that the defendant was never convicted nor even arrested for any offense set forth in said fifth specification of error. To the Court's order denying said motion, defendant and plaintiff in error

duly excepted. (Specification of Error No. 5 mentioned above will be Specification No. 4 in this brief.)

VI.

The Court erred in denying the motion of defendant and plaintiff in error for a directed verdict of not guilty made at the conclusion of the Government's case because there was not sufficient evidence to convict the defendant of any of the counts set forth in the information, and upon the further ground that there was a material variance between the information and the proof adduced. The information alleged that a nuisance was maintained at 950 Hampshire Street, San Francisco, and there was proof to show that if an offense was committed it was committed at 590 Hampshire Street, San Francisco.

To the Court's order denying said motion, the defendant and plaintiff in error duly excepted.

VII.

The Court erred in granting the motion of the Government to strike out the following testimony on the ground that it was immaterial. Said testimony was given by Edward A. O'Dea, Esq., attorney for the defendant and plaintiff in error as a witness for the defendant and plaintiff in error. Said testimony was as follows:

> "On Sunday last, with Mr. Heitman, I saw a place at 950 Hampshire Street and if there was such a place it would be between 21st and

> 22nd Streets, San Francisco. I saw 590 Hampshire Street. It was the paint shop, with the building described by the witnesses and it was on Hampshire Street, between 17th and 18th.''

To the Court's order granting said motion, defendant and plaintiff in error duly excepted.

VIII.

The Court erred in overruling the objections of the defendant and plaintiff in error to questions asked the defendant and plaintiff in error on cross-examination by the United States Attorney when he was a witness testifying in his own behalf. The subject matter of said question was a previous arrest at Salada Beach for having a still. Said questions were objected to on the ground that they were incompetent, irrelevant and immaterial, not proper cross-examination, involving questions not at issue in the case; that they constituted prejudicial error on the part of the United States Attorney and that the only question permitted on such a subject would be, ''Was the defendant ever convicted of a felony?''

To the Court's orders overruling said objections, plaintiff in error and defendant duly took appropriate exceptions.

IX.

The Court erred in admitting in evidence, over the objection of the defendant and plaintiff in error, the records of the United States District Court in

case No. 12,613 entitled "United States v. Henry Heitman," the United States Attorney calling particular attention to the defendant's plea of guilty in that case. (The record showed that United States District Judge Van Fleet granted a motion excluding evidence to three counts in said information, and denied the motion in one count, to-wit, having property in his possession designed for the unlawful manufacture of liquor. To this count the defendant had pleaded guilty.) The defendant's objection was upon the ground that the evidence was incompetent, irrelevant and immaterial and contained prejudicial matter which had nothing to do with the issues involved in the instant case.

To the Court's order overruling said objection, defendant and plaintiff in error duly excepted.

X.

The United States Attorney was guilty of misconduct which was highly prejudicial to the rights of the defendant when in his argument to the jury at the close of the case he made certain remarks, which remarks were excepted to by the defendant at the time, assigned as misconduct and the Court was requested by the defendant to instruct the jury to disregard said remarks. Said remarks, exceptions, assignment of misconduct, request of the Court and instruction by the Court were as follows:

> "Mr. McDonald. In this case, Gentlemen, we have one of the most flagrant and persistent offenders against the Prohibition Act in this

district. He was first apprehended by Agents Toft and Cory at Miramar—

Mr. O'Dea. For the protection of the defendant's rights, your Honor, if this evidence was admitted for any purpose it was admitted for only one purpose, to show that if he possessed that liquor at this place, or that still, that he possessed it with a guilty knowledge. The District Attorney is not to be permitted to argue the proposition that because this man was arrested once before he is likely to have committed this offense here. I wish to take an exception to the District Attorney's remarks, and assign them as misconduct, and I ask your Honor to instruct the jury and tell the jury that if the evidence is to be considered at all the purpose for which the evidence is, is to be considered.

The Court. That is just what I will do, Mr. O'Dea. I did not understand Mr. McDonald's opening statement or his argument to go any further than that.

Mr. O'Dea. He said, 'We have here one of the most flagrant bootlegger in California,' and that this man was arrested by Agent Cory at such and such a date. That is what I am objecting to.

The Court. What is it you are objecting to, that he is a flagrant bootlegger?

Mr. O'Dea. To that, and to his conclusion that he is flagrant bootlegger from the fact that he was arrested before.

The Court. Of course, the District Attorney has a perfect right to narrate any evidence that has been admitted to the jury. The statement that he is a flagrant bootlegger is for the jury to determine, and not to be taken from the District Attorney. It will be determined from the evidence in this case. You will be instructed hereafter, Gentlemen, as to the purpose for

which evidence of other crimes was admitted. Proceed, Mr. McDonald."

The Court afterwards, on this subject, gave this instruction:

"The Court has admitted evidence that the defendant has pleaded guilty to the possession of a still upon another occasion at Salada Beach. You are to take that evidence into consideration, Gentlemen, only in your determination of the first count or charge of the complaint; that first count charges that the defendant here had in his possession jackass brandy and other things for the purposes of sale, and that in that he maintained a common nuisance. The so-called Volstead Act provides that where a man has in his possession alcoholic liquor for the purpose of sale, that constitutes a nuisance. That evidence was introduced merely as bearing upon the question as to whether or not, if you find that this liquor was in the possession of this defendant, whether he had it there for commercial purposes or for his own use. Under such circumstances, however, the law presumes where a man has liquor in his possession he has it for purposes of sale; that is to say, if you are found with liquor in your possession in any other place than your private house, that constitutes prima facie evidence, that you had it for sale. Therefore, on the first count, if you determine that he did have liquor in his possession, you are likewise to determine whether he had it for sale."

XI.

The United States Attorney was guilty of misconduct which was highly prejudicial to the rights of the defendant when in his argument to the jury

at the close of the case he made certain remarks, which remarks were excepted to by the defendant at the time, assigned as misconduct, and the Court was requested by the defendant to instruct the jury to disregard said remarks. Said remarks, exceptions, assignments of misconduct, request of the Court and instruction by the Court were as follows:

> "Mr. McDonald. Now, Gentlemen, from those two facts and from the testimony you have heard today, from Mr. Powers' statement that he followed him to this place on numerous occasions, saw him there, and that he came in there while the raid was going on, and statements that he made to Mr. Powers at that time, and the statement that he made to Agent Bernhard that he wanted to fix this thing up, I am going to ask you, Gentlemen, what do you think of the case? Do you think there is any question, do you think there is any reasonable doubt that this man was running that still out there on Hampshire Street? It does not make any difference, Gentlemen, whether it was 950 or 590 or what the number was; he was running a still in the Northern District of California, and that is sufficient. You will be so instructed by the Court. And, Gentlemen, when you consider that evidence, you can only find a verdict of guilty on all the counts in the information in this case.
>
> Mr. O'Dea. I didn't wish to interrupt the District Attorney, but now that he is through with his opening argument, I wish to take an ception to the reference, after your Honor had mentioned the matter, to Salada Beach and Miramar as having nothing to do with the issues in this case, and as prejudicial to the rights of this defendant.
>
> The Court. Let the exception be noted.

Mr. O'Dea. And I ask your Honor to instruct the jury to disregard that statement of the District Attorney.

The Court. I will instruct them to the best of my ability what the purpose of that testimony is."

(Thereafter, the Court in its instructions to the jury upon the subject here under discussion gave only the instruction set forth in plaintiff in error's Specifications of Error No. XI.) (Specification of Error No. XI mentioned above will be Specification No. X in this brief.)

XII.

The United States Attorney was guilty of misconduct which was highly prejudicial to the rights of the defendant when in his argument to the jury in reply to counsel for the defendant's argument to the jury he closed same with certain remarks; which remarks were excepted to by the defendant at the time, assigned as misconduct and the Court was requested by the defendant to instruct the jury to disregard said remarks. Said remarks, exceptions, assignment of misconduct, request of the Court and instruction by the Court were as follows:

"Mr. McDonald. I am going to ask you to take into consideration his connection with that former case, his prior record, in connection with a still.

Mr. D'Dea. I object to that and take an exception to it, and ask your Honor to instruct the jury regarding it.

The Court. Yes, I will instruct the jury in reference to it."

(Thereafter the Court in its instruction to the jury upon the subject here under discussion gave only the instruction set forth in plaintiff in error's Assignment of Errors No. XI.) Specification of Error No. XI mentioned above will be Specification No. X in this brief.)

XIII.

The Court erred in giving the following instruction over the objection of the defendant and plaintiff in error to which instruction defendant and plaintiff in error duly excepted:

> "There appears to be a discrepancy here in the number of the street at which this still was found. You are not to consider that at all. The question as to whether or not it was 950 or 590 is of no concern in this case whatsoever, if you find that a still was actually found there."

XIV.

The Court erred in refusing to give the following instruction requested by defendant and plaintiff in error:

If you find from the evidence that liquor was not kept for sale at 950 Hampshire Street, in the City and County of San Francisco, State of California, then you must acquit the defendant of the charge contained in the information of maintaining a common nuisance in violation of Section 21 of Title II of the National Prohibition Act.

To the Court's refusal to give said instruction, plaintiff in error and defendant duly excepted.

III.

ARGUMENT.

I.

IN A PROSECUTION FOR MAINTAINING A COMMON NUISANCE IN VIOLATION OF SECTION 21 OF TITLE II OF THE NATIONAL PROHIBITION ACT PROOF OF THE SPECIFIC PLACE WHERE SAME WAS MAINTAINED IS ESSENTIAL. IF THE EVIDENCE SHOWED THAT SAME WAS MAINTAINED ON A PLACE OTHER THAN THAT SET FORTH IN THE INFORMATION THERE WOULD BE A FATAL VARIANCE BETWEEN THE ACCUSATION AND THE PROOF ADDUCED.

The Court Erred in Its Refusal to Permit the Plaintiff in Error to Produce Proof That the Premises Whereon the Alleged Nuisance Was Maintained Was at a Place Other Than That Set Forth in the Information and by Striking Out Testimony Tending to Prove Variance.

The Court Erred in Denying the Motion of Plaintiff in Error for a Directed Verdict of Not Guilty Particularly as to Count One of the Information Upon the Ground That There Was a Material Variance Between the Information and the Proof Adduced.

The Court Erred in Instructing the Jury That It Was of No Concern Whether the Still Was Found at 950 or 590 Hampshire Street, San Francisco.

The Court Erred in Refusing to Give the Instruction Requested by Plaintiff in Error Upon This Subject.

(Assignments of Errors Nos. VII, VIII, XIV and XV set forth in this brief as Specifications of Errors VI, VII, XIII and XIV.)

These points are raised by the exceptions of plaintiff in error to the Court's refusal to permit a witness to testify as to the location of the place mentioned in the information and by striking out testimony concerning same (Trans. Rec. pages 32 and 33); by the exception of plaintiff in error to the Court's order denying a motion for a directed verdict made upon the ground of a material variance between the facts set forth in the information and the proof adduced (Trans. Rec. page 31); by his exception to the Court's instruction upon the subject (Trans. Rec. pages 59 and 62); and by his exception to the Court's refusal to give his instruction upon same (Trans Rec. page 62).

Plaintiff in Error Was Charged in Count One of the Information With Maintaining a Common Nuisance in Violation of Section 21 of Title II of the National Prohibition Act at a Particular Place, To-Wit, 950 Hampshire Street, San Francisco.

Section 21 of the National Prohibition Act provides:

> "Any *room, house, building, boat, vehicle, structure,* or *place* where intoxicating liquor is manufactured, sold, kept or bartered in violation of this Title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuis-

> ance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than a thousand dollars or be imprisoned for not more than one year or both." (Barnes Fed. Code (Cum. Suppl. 1923), Section 8351t, page 738.)

The unquoted portion of Section 21 creates liens for the payment of fines upon the property found to be a common nuisance. Section 22 of the act provides for the abatement of such a nuisance. Section 23 provides for personal nuisances and Section 24 provides penalties for the violation of injunctions, temporary or permanent, where places have either been declared common nuisances or suits have been instituted to have them so declared.

These four sections create the National law on "nuisance" and must be read together.

It should be noted that the sections referred to above, except in case of Section 23, are directed to the "place" primarily. They presuppose an inclosure of some kind or at least a situs.

There is only one definition of nuisance in the act. A nuisance must first be proved, then the person maintaining same may be prosecuted, and subjected to the penalties provided by Section 21. He may be enjoined from continuing the said nuisance and the nuisance itself may be abated in accordance with the terms of Section 22 of the act. Thereafter the penalties further provided by Sections 23 and 24 may be invoked. Criminal prosecutions, legal

actions and equitable proceedings must all be predicated on the same kind of nuisance. The act itself draws no distinction between them.

It Is Imperative That the Information, Bill or Complaint Alleging a Nuisance Should Charge the Proper Place.

Plaintiff in error has a legal right to be informed of the nature and the cause of the accusation,

(Sixth Amendment to the United States Constitution);

United States v. Hess, 124 U. S. 483;

United States v. Carrl, 105 U. S. 611;

United States v. Simmons, 96 U. S. 360;

United States v. Cruikshank, 92 U. S. 542;

and when charged by information that he maintained a common nuisance at 950 Hampshire Street, San Francisco, the law presuming him innocent of maintaining said nuisance, it is a violation of the Sixth Amendment to the United States Constitution to compel him to prove upon the day of his trial that he did not maintain a common nuisance at 590 Hampshire Street, San Francisco, California. Especially is this so when the place where the nuisance is maintained is one of the essential ingredients of the offense.

Hattner v. United States, 293 Fed. 381 (C. C. A. 6th Circuit).

In the case last cited, the defendant was charged with maintaining a common nuisance at 2057 North Fourteenth Street in Toledo, Ohio, where intoxicating liquor was kept and manufactured in violation

of Title II of the National Prohibition Act. On the trial, it appearing by the testimony of two witnesses that the nuisance was maintained at 3428 Ursula Boulevard in Toledo, there being no evidence of such maintaining at 2057 North Fourteenth Street, the jury was discharged. On the same day plaintiff in error was again arraigned on an information differing from the earlier one only in that the alleged nuisance was charged to have been maintained at No. 3428 Ursula Boulevard. On the trial, under the second information, a motion for plaintiff in error for a discharge on the ground of former jeopardy was granted as to the first and second counts but denied as to the third. The Court in that case said:

> "We think it clear that plaintiff in error was not twice put in jeopardy upon the charge of maintaining a common nuisance. Under Section 21, Title II, *the specific place of maintaining the nuisance is important and material. The specific 'building' * * * or 'place' where intoxicating liquor was made and kept is declared to be a common nuisance.* The one maintaining this specific nuisance is made subject to prosecution therefor, and guilty knowledge of such use by the owner of the building or place makes the same subject to lien for and liability to be sold to pay the fine and costs against the convicted defendant. It was thus material whether the place of maintaining the nuisance was alleged or proven as at the one location or the other. There is no claim that the two locations were substantially the same. In denying the motion for discharge under the third count the trial judge said that the two

> charges were 'as distinct as any two set of facts with three or four miles separating them, or distinct from each other * * *. A man can not be said to be guilty of committing a nuisance in one place because the evidence tends to show he is guilty of committing precisely the same kind of nuisance in another place,' indeed one might be convicted under separate informations of maintaining a nuisance at one and the same time at each of the two places."

It has been held that a material variance between the evidence and the allegations of the indictment will not sustain a conviction, because based upon the Constitutional guarantee that an accused shall be informed of the nature and the cause of the accusation against him.

Guilbeau v. United States, 288 Fed. 731 (C. C. A. Fifth Circuit);
Naftzger v. United States, 200 Fed. 494 (C. C. A. Eighth Circuit);
United States v. Riley, 74 Fed. 210 (C. C.).

Aside from the violation of the Constitutional rights of an accused, the rights of third parties may also be involved when the specific description of the property whereon the nuisance is alleged to have been maintained is not accurately set forth in the information for Section 21 of the National Prohibition Act subjects the owner of the place whereon the nuisance is maintained to a lien to pay fines and costs assessed against the person guilty of such nuisance for such violations and any such lien may be enforced in any court having jurisdiction. Fur-

thermore the abatement and injunction provisions of the Prohibition Act may also be invoked to the detriment of innocent property holders, if proceedings invoking the most drastic provisions of the act are carelessly instituted.

In the instant case there was undoubtedly a conflict in the evidence as to the place where the nuisance was maintained, one of the Government witnesses finally stating that the alleged nuisance was maintained at 590 Hampshire Street (Trans. Rec. page 31). The defendant testified that he was arrested by Agent Powers at 18th and Hampshire Streets, at 590 Hampshire Street and that he was not arrested at 950 Hampshire Street (Trans. Rec. page 33). The defendant attempted to introduce evidence that 950 Hampshire Street was between 21st and 22nd Streets in San Francisco. 590 Hampshire Street was the paint shop with the building upstairs described by the witnesses and that it was between 17th and 18th Streets (Trans. Rec. pages 31 and 32). This latter testimony, which was given by counsel for plaintiff in error was ordered stricken out by the Court upon the motion of the United States Attorney, upon the ground that it was immaterial, to which plaintiff in error duly excepted and which we respectfully submit was error.

The Court erred in denying the motion of defendant for a directed verdict of acquittal on the ground that there was a material variance between the information and the proof adduced and we be-

lieve that the Court erred when it instructed the jury as follows:

> "There appears to be a discrepancy here in the number of the street at which this still was found. You are not to consider that at all. The question as to whether or not it was 950 or 590 is of no concern in this case whatsoever, if you find that a still was there" (Trans. Rec. page 62).

The Court erred when it refused to give the following instruction requested by the plaintiff in error at the proper time, to-wit, at the end of the Court's charge:

> "If you find from the evidence that liquor was not kept for sale at 950 Hampshire Street in the City and County of San Francisco, State of California, then you must acquit the defendant of the charge contained in the information of maintaining a common nuisance in violation of Section 21 of Title II of the National Prohibition Act" (Trans. Rec. page 62).

The testimony ordered stricken out showed that there were four city blocks in a populous portion of San Francisco between 590 and 950 Hampshire Street.

950 Hampshire Street is therefore not another description of 590 Hampshire Street.

The plaintiff in error, if the instant conviction be sustained, can again be prosecuted also for maintaining a nuisance at 590 Hampshire Street. He can therefore be placed twice in jeopardy and punished for the same offense though there was no evi-

dence that nuisances were maintained at two different places. If there be such a place as 950 Hampshire Street, that property is subject to the drastic provisions of Sections twenty-one to twenty-four of the National Prohibition Act. The Government or any private law enforcement organization has it within their power to institute abatement proceedings enjoining the occupation of 950 and 590 Hampshire Street for a period of one year.

We respectfully submit that the question herein presented is not a technical one, but presents an issue of much importance to the safeguarding not only of Constitutional rights of one accused of a public offense, but of the quiet and peaceable enjoyment of property.

II.

ADMISSION IN EVIDENCE OF IMMATERIAL TESTIMONY OF A PREVOUS RAID WHERE THERE WAS NO ARREST OF THE DEFENDANT AT VALLEMAR, SAN MATEO COUNTY AND A PREVIOUS PLEA OF GUILTY TO THE POSSESSION OF PROPERTY DESIGNED FOR THE MANUFACTURE OF LIQUOR AT SALADA BEACH, THE HOME OF THE DEFENDANT, PRIOR TO THE CHARGES IN THE INSTANT CASE, CONSTITUTED PREJUDICIAL ERROR.

(Assignments of Errors Numbers II-IV-V-VI, IX and X.)

(Trans. Rec. pages 76, 77, 78, 79, 80 and 81.) Set out in this Brief as Specifications of Errors Numbers I, III, IV, V, VII and IX.

These points are raised by the timely objections made by plaintiff in error at the time of the introduction of the prejudicial matter upon appropriate grounds. The Court was thoroughly appraised of the questionable nature of this subject matter and the menace contained in same to the right of the accused to an impartial trial by an impartial jury.

(Trans. Rec. pages 18 to 22, 27 to 29, 34 to 54.)

Plaintiff in error protected his objections to one type of testimony by a subsequent motion to strike out same (Trans. Rec. page 29) and he moved the Court to instruct the jury to disregard all of the objectionable testimony adduced. (Trans. Rec. pages 19-21 and 37.) The plaintiff in error took exceptions to the rulings of the Court on said objections and motions and did everything possible to properly bring this case to this Court for a review of the lower Court's rulings.

Plaintiff in error was charged by the United States Attorney in a carelessly drawn information, with maintaining a common nuisance in keeping for sale two one hundred and twenty gallon stills, four burners, two pressure tanks, tanks, five five hundred gallon vats, three hydrometers, three thousand gallons of mash, one hundred gallons of what is called jackass brandy, all of which the United States Attorney in the information described as intoxicating liquor, which was in excess of a half of one per cent and which was fit for use for beverage purposes. He was charged with maintaining said

nuisance on the 4th day of June, 1923, at 950 Hampshire Street in the City and County of San Francisco. He was also charged with possessing the same property and with having the same property in his possession which property it was charged was designed for the manufacture of intoxicating liquor. The information charges the last offense as a violation of Section 3 of Title II of the National Prohibition Act, when as a matter of fact same is forbidden by either Sections 18 or 25 of said act.

On the trial little or no evidence was produced to connect plaintiff in error with the charges set forth in the information. There was no evidence showing that the defendant owned any of the property mentioned therein. A witness for the Government, K. H. Koss, who was the manager of the premises where the alleged violations of the law occurred did not rent the place to plaintiff in error but to a man by the name of Harris, whom Koss attempted to describe. (Trans. Rec. page 30.) Koss did not state on the witness stand that plaintiff in error had anything to do with any violations of the law on the premises managed by him, but said that plaintiff in error was a member of the same lodge with him and came to see him frequently at his office, adjoining said premises. Koss testified that he remembered telling Government Agent Powers, "there is one of them now," when plaintiff in error appeared on the scene, at the time Powers said "there is quite a few fellows coming

there. Well, there is quite a few." (Trans. Rec. page 30.) If this could be considered as testimony against plaintiff in error it should be observed that he did not testify to same directly or indirectly on the witness stand and it must be assumed that he would not testify that plaintiff in error ran the still or owned the same or the intoxicating liquor else the District Attorney would have elicited those facts from him in Court. Surely such testimony was available and if it were given it would be supported by his oath, while the statement he made, which caused the arrest of the plaintiff in error was most probably made by him at the time to save himself from arrest, because he undoubtedly was guilty of aiding and abetting in the commission of all the charges of violating the Prohibition Law set forth in the information, *and too the statement made by him was unsworn.* Government witness Powers said that he did not remember that when the remark was made, as above set forth, by Koss, whether the plaintiff in error said anything and afterwards, he admitted on cross-examination that it was possible that he said something. (Trans. Rec. page 27.) In other words, Powers would not deny that at the time the remark was made by Koss that Heitman denied same.

Plaintiff in error was not on or in said premises at the time of the raid. Witness Powers testified "the stills were upstairs, he (Heitman) didn't have any opportunity to go up there. I was not at the time where the stills were and the defend-

ant was not up there. He was not there while I was there at all." (Trans. Rec. page 27.) Two witnesses for the Government testified that plaintiff in error, said when placed under arrest, "Can't we fix it up?" (Trans. Rec. pages 22 and 25.) And that he did not offer any money. (Trans. Rec. page 22.) Agent Powers said he didn't ask me to let him go upon the payment of money or anything of that kind, just to fix it up. I didn't see any money, there was no actual tender of money. (Trans. Rec. page 26.) Plaintiff in error explained this remark made, by the following testimony:

> "Well, when Agent Powers arrested me I didn't know what to say. I didn't know what I was arrested for. I said, 'What are you arresting me for?' and I might have said through the excitement, 'Can't we fix it up' but I didn't mean for bribery or anything like that. I thought I might explain it to him. I never knew there was liquor in the premises to start in with. I didn't go in the upper part of those premises where the still was." (Trans. Rec. page 34.)

Plaintiff in error denied under oath any knowledge of the manufacture of liquor at 590 Hampshire Street or at the place where the property designed for the manufacture of liquor was found. He denied the ownership of any property found on said premises. He denied leasing the premises from any person and said he was in the neighborhood for the purpose of visiting an old friend of his at his office, which was not in the place where the still was found.

There was No Other Evidence Adduced to Connect the Defendant With the Crimes Set Forth in the Information.

It is respectfully submitted that the testimony above referred to was as consistent with the defendant's innocence as with his guilt. The Court should have granted the motion of plaintiff in error for a directed verdict of not guilty made at the conclusion of the Government's case. (Trans. Rec. page 39 and Assignment of Error Number 6 in this brief.) And we submit it was error when the Court did not do so. It is true that the defendant produced evidence, after the denial of his motion in this behalf, but not a single fact was elicited from him or his witness which added additional weight to the Government's case, except the prejudicial matter herein complained of. It is submitted that plaintiff in error believed that when he asked for an instruction upon the question of variance and fortified his position on the prejudicial matters complained of by copious objections, motions and exceptions that it was unnecessary for him to run the risk of an adverse ruling from the Court, which in effect would mean that even with his testimony the evidence was sufficient to convict him, by renewing the motion for a directed verdict. Such a motion made and denied would only have the effect of further prejudicing the defendant in the eyes of the jury. If in the instant case a renewal of this motion were necessary, plaintiff in error requests this Court to invoke Rule

XI of its Rules so as to save plaintiff in error from a possible miscarriage of justice.

If the Court had submitted the facts above set forth alone to the jury there is not much question what the verdict of the jury would have been; for with all the prejudicial matter before them the jury deliberated for over an hour before returning their verdict. (Trans. Rec. page 62.)

It must be conceded therefore that if the Court erred in admitting in evidence extraneous and irrelevant matter, highly prejudicial in its very nature, that the Court's error was directly responsible for the conviction of plaintiff in error.

The objectionable testimony was not admitted to impeach the testimony of plaintiff in error for some of it was allowed to go before the jury before plaintiff in error took the witness stand and was offered in the Government's case in chief. (See the testimony of Government witnesses, Bernhard and Corey.) (Trans. Rec. pages 18, 21, 27, 28 and 29.) And plaintiff in error pointed out to the Court that the only manner in which matters of this kind, in which an accused could be impeached by such a method would be to ask the accused if he had ever been convicted of a felony. (Trans. Rec. page 35.) It could not be used for the purpose of establishing a case against the plaintiff in error or connecting him with a violation of the law. The offenses with which the defendant was charged were not ones requiring proof

of a specific intent. There was no question of guilty knowledge. The law makes possession of liquor illegal. So does the law make the possession of property designed for the manufacture of intoxicating liquor illegal in itself. And the defendant was not found in the possession of either. The maintenance of a nuisance under Section 21 of the Prohibition Law implies a continuity of action at a particular place for a substantial period, and if, which is not so in the instant case, the defendant was actually convicted of maintaining a common nuisance at Vallemar, or at Salada Beach, San Mateo County, fifteen miles distant from the nuisance which is alleged to have been maintained, outside of which defendant was arrested in this case, it is respectfully asked in what possible manner such convictions for nuisance would show that the defendant was guilty of maintaining a nuisance in the present case?

It should be noted here that unlike the offenses of illegally possessing intoxicating liquor, selling or manufacturing same, the law does not inflict any greater punishment for second or subsequent convictions for maintaining a common nuisance.

The Court said that such testimony was brought before the jury's attention for the purpose of proving the charge of nuisance. Let us quote the language of the Court:

> *"Mr. O'Dea, I have passed upon that day after day and day after day. I have uniformly held and I am satisfied I am right, that where*

there is a charge of nuisance, evidence of OTHER SIMILAR OFFENSES *is admissible.*" (Trans. Rec. page 19.)

THE DEFENDANT WAS NEVER BEFORE CONVICTED OF MAINTAINING A COMMON NUISANCE UNDER SECTION 21, TITLE II OF THE NATIONAL PROHIBITION ACT OR UNDER ANY OTHER LAW.

In the first objectionable case produced before the jury as testified to by Government witness, I. H. Cory (Trans. Rec. pages 27 to 29), the plaintiff in error was not even arrested. The defendant was seen in a barn in Vallemar Canyon on the coast of Central San Mateo County with another man who was tacking up black paper around the barn. They had a large tub there in the center which the agents said was evidently for a worm tap. But there was no worm there or any still there. A bantering jest, upon the visit of the Prohibition officer was made to him by plaintiff in error. This is all the evidence revealed. This was not proof of maintaining a common nuisance or of any other crime and its only possible purpose was prejudicial.

In the case in which the record was produced, preluded as it was, by the ominous references to it by the United States Attorney, the fact was revealed that the defendant pleaded guilty to the charge of having in his possession certain property designed for the manufacture of liquor on the 27th day of November, 1922, at Salada Beach, in the County of San Mateo, State of California. AND THAT THE

Court Ordered All Other Counts Dismissed. In that case the defendant was not charged with having maintained a common nuisance in violation of Section 21 of Title II of the National Prohibition Law. (Trans. Rec. pages 40 and 54.)

In this record, there is included the motion of the defendant to return property in the case of his arrest at Salada Beach. Here there was such an aggravated case of violation of his constitutional rights that the late Judge William C. Van Fleet ordered the counts charging illegal manufacture, and possession dismissed and accepted the plea of guilty he did, because the property mentioned was not found in the defendant's dwelling house which the Prohibition agents so flagrantly violated. In that case the motion was based upon substantial grounds. The attention of the Court is called particularly to the following:

> "On the same date after the hour of 11 o'clock P. M., long after the sun had set, the above mentioned Federal Prohibition Enforcement Officers surrounded the dwelling house of your petitioner, certain of them going to the front door and others remaining in the rear of said dwelling house; that thereupon certain of said officers pounded on the front door of the petitioner's home, waking your petitioner and Poet, who were in bed and undressed; one of the number called out of the blackness of the night, 'open the door we are Federal Officers.' Your petitioner who was uncertain whether they were criminal marauders or really in fact Federal Prohibition Enforcement Officers, asked if they had a search warrant, to which

> they made reply, that they did not need any, and said 'if you don't open the door we are going to break in,' to which your petitioner replied, 'wait till I get dressed,' and that thereupon one of their number, whom your petitioner has since been advised, was not even a Federal Prohibition Enforcement Officer, but acting under their supervision, illegally and unlawfully opened one of the rear windows and climbed into the petitioner's dwelling house and he illegally and unlawfully went into said premises, opened the front door and allowed the Prohibition Enforcement Officers to enter; that at said time none of said Federal Prohibition Officers had any search warrant to search the petitioner's home; they had no warrant for his arrest or the arrest of any occupant of said home; they had made no previous purchases of liquor from said premises, no crime was being committed in their presence and your petitioner and his friend were asleep and oblivious to Prohibition Officers' previous acts." (Trans. Rec. pages 49 and 50.)

The "previous acts" referred to took place in the seizure from the barn connected with the dwelling house, which was made a few minutes before. The learned Judge differentiated between the barn and the home, which was the reason for the defendant's plea as set forth in this record.

The record of the previous case occupying so much space in this record was not even read to the jury. The jury believed that the defendant was convicted of manufacturing liquor in violation of the law and of maintaining a common nuisance at the place charged in that information and none of

the facts or harrowing circumstances attendant upon the search and seizure were read. *The record was put in as proof absolute that the defendant was a very bad man and a flagrant violator of the Prohibition Law, to which the United States Attorney made frequent reference in his closing argument to the jury.*

It is proper here to remind this Court of the language used by it in the case of *Allen v. United States,* 115 Fed. 3, on page 12, and cited very recently in the case of *Manning v. United States,* 287 Fed. 800; (C. C. A. 8th Circuit).

In the Allen case, this Court said:

> "All men stand equal before the law, and have the same constitutional rights and privileges. The high and the low, the poor and the rich, the criminal and the law abiding, when indicted and accused of crime, are entitled under the law, to a fair and impartial trial. This is a sacred boon guaranteed to every person, and of which no one should ever be deprived. The law in its extended reach, power and influence, is as tender of the rights of the man who is supposed to be bad as it is of the liberties and rights of the man who is supposed to be good. The trial of every man should be free from undue prejudice or odium, especially upon the part of all officers clothed with power and charged with the duty of administering the law in such a manner as to reach the ends of justice and right."

The record of a prior judgment and a plea of guilty of having in one's possession property designed for the unlawful manufacture of liquor to

substantiate a charge of nuisance is in effect condemned by this Court in the case of *Hazleton v. United States,* 293 Fed. 384. Here this Court said:

> "Doubtless a record of a prior judgment and a plea of guilty of having kept in June, 1922, a place where intoxicating liquor was sold would have been admissible against the defendant upon the ground that such an offense was connected with the charge under investigation, as part of the continuing offense; but it was very prejudicial to allow the prosecution, as part of its case in chief, to introduce evidence of a plea of guilty of an apparently collateral offense. The evidence was not admissible as affording a legal inference of guilt of the crime for which defendant was being tried, and clearly its effect must have been to impress the minds of the jurors that the defendant was a woman of bad tendencies and unworthy."
>
> "For the reason, therefore, that reception of the evidence conflicted with the firmly rooted rule that the prosecution may not initially assail defendant's character, the judgment must be reversed and the cause remanded with directions to grant a new trial."

Evidence of Previous Offenses Collateral to the Issue to Be Tried and Not Bearing Directly and Unequivocally on Any Issue Before the Court, Except to Show That the Defendant was a Man Who was Arrested Before or Who Pleaded Guilty to a Misdemeanor Not Germane to Present Charge, Is Prejudicial, and Permitting the Introduction of Same Before the Jury Over the Objection of Defendant Constitutes Prejudicial Error.

It was so held in the following authorities:

Hall v. United States, 150 U. S. 76;
Boyd v. United States, 142 U. S. 454;
Jianole v. United States, 299 Fed. 496; C. C. A. 8th Circuit;
Sischo v. United States, 296 Fed. 696; C. C. A. 9th Circuit;
Gart v. United States, 294 Fed. 66; C. C. A. 8th Circuit;
Hazelton v. United States, 293 Fed. 384; C. C. A. 9th Circuit;
Cohen v. United States, 291 Fed. 368; C. C. A. 7th Circuit;
Hatchet v. United States, 293 Fed. 1010;
Newman v. United States, 289 Fed. 712; C. C. A. 4th Circuit;
Manning v. United States, 287 Fed. 800; C. C. A. 8th Circuit;
Beyer v. United States, 284 Fed. 225; C. C. A. 3rd Circuit;
McDonald v. United States, 264 Fed. 733; C. C. A. 1st Circuit;
Harris v. United States, 260 Fed. 531; C. C. A. 8th Circuit;
Paris v. United States, 260 Fed. 529; C. C. A. 8th Circuit;
Fish v. United States, 215 Fed. 544; C. C. A. 1st Circuit;
United States v. Lundquist, 285 Fed. 447;
People v. Johnson, 63 Cal. App. 178.

In the case of *Boyd v. United States,* 142 U. S. 454, at page 458, Supreme Court Justice Harlan said:

> "But we are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Stanley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried." * * * "Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death."

In the case of *Jianole v. United States,* 299 Fed. 496, the circumstances were much the same as in the instant case. Here the Court said on page 499 of the Reporter:

> "The Court allowed the defendant, over objection to be questioned in regard to former pleas of guilty to a charge of unlawful manufacture of liquor. It is a general rule of criminal law that the conviction of the defendant of a crime not set forth in the information or indictment is not competent evidence on the trial of the particular charge before the Court. It is true there are exceptions to this rule, for instance, where the criminal intent of the de-

fendant must be proved as an ingredient of the crime charged, proof of his commission of other like offenses at about the same time may be admissible on that question. So we confine our ruling to the particular facts of the instant case, as it is not within any of the exceptions. The testimony referred to showed that Jianole had pleaded guilty to a misdemeanor a year and a half before the date of the alleged felony. There was no connection between the two, either in respect to point of time or similar offense. See Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. 292; 35 L. Ed. 1077; Paris v. United States (8th C. C. A.), 260 Fed. 529, 171 C. C. A. 313; Wolf v. United States (C. C. A.), 290 Fed. 738; De Witt v. United States (C. C. A.), 291 Fed. 995."

So in the case of *Beyer v. United States,* 282 Fed. 225 (C. C. A. 3rd Circuit).

The Court said on page 227:

"While proof of the possession of liquor at another time was collateral and immaterial so far as establishing the issue on trial is concerned, its effect upon the jury was detrimental and prejudicial to the defendant. Evidence that he committed other crimes at other times may not be admitted to show that he had it within his power and was likely to commit the particular crime with which he was charged."

Lastly, it would be well to call the attention of this Court to the attitude of the California State Courts upon this particular question as revealed in the case of *The People v. Henry Johnson,* 63 Cal. App. 178. Note the language of the Court so applicable to the case under discussion; it is to be found on page 183 and is as follows:

"While, ordinarily, the determination of a sharp conflict in the evidence addressed to the proof and disproof of a disputed issue of fact is a matter entirely within the province of the jury, or the Court, if the questions of fact are submitted to its decision, still the very fact that there is here such a positive evidentiary conflict compels the conclusion that the allowance of so large an amount of hearsay testimony as in proof of the defendant's guilt had the effect of denying to him that fair and impartial trial to which every person on trial for his life or his liberty in our Country is entitled as a matter of absolute right. Nor, even upon its face is the competent evidence of guilt in this case so overwhelming in probative weight or force so as to warrant the conclusion that a miscarriage of justice would not result from the verdict, if it is permitted to stand. It may be conceded that Section 4½ of Article VI of the Constitution is a mantle within the dark recesses of whose ample folds a multitude of errors occurring in the trial of a case may rest secure against judicial inspection, but we can not persuade ourselves that it was ever intended as authority supporting or sanctioning the denial to a defendant in a criminal or a litigant in a civil case a fair and impartial trial according to the law of the land."

"Not alone upon the foregoing consideration do we conclude that the defendant was not accorded the character of trial which the laws guarantee to him, but our view also is that the testimony of sales made in said saloon prior to the time at which the defendant purchased the place and himself took responsible control and management of the establishment was wholly irrelevant to the issue in his case, and that its effect was to prejudice him in the minds of the jury. Such testimony might be pertinent to

> and admissible in a civil case to abate the nuisance, but certainly it is wholly foreign to this case, which, it must be kept in mind involves a crime of criminal conduct on the part of the accused."

It would seem therefore that the Courts of this Country both National and State are at one in their condemnation of the admission in evidence of collateral and irrelevant matters, prejudicial in their very nature, such as those under discussion in the instant case.

III.

MISCONDUCT ON THE PART OF THE UNITED STATES ATTORNEY IN HIS ARGUMENT TO THE JURY WHEREIN HE ARGUED THAT THE DEFENDANT WAS GUILTY IN THE INSTANT CASE ON ACCOUNT OF HIS PREVIOUS HISTORY; AND ERROR ON THE COURT'S PART IN ITS TACIT REFUSAL TO INSTRUCT THE JURY TO DISREGARD SAME.

(Assignments of Errors XI-XII and XIII; Specifications of Errors X-XI and XII in this brief.)

These points were properly raised by plaintiff in error; on three different occasions he excepted to them and assigned them as misconduct; and asked the Court to instruct the jury against them, which the Court promised to do at a later time. (Trans. Rec. pages 55, 56, 57.) We submit that the Court should have warned the jury to disregard the remarks at the time his attention was called to them.

It will be noted that during the trial also the Court stated that it would instruct the jury how they should regard testimony concerning the occurrences at Vallemar and the defendant's plea of guilty to the possession of property designed for the manufacture of liquor at Salada Beach. We submit the Court's instructions in this behalf in reply to the many requests of plaintiff in error for the Court to instruct the jury to disregard the said matters and the use to which the District Attorney put said incidents.

Here is the only instruction given by the Court on the subject at all: the Vallemar incident was omitted entirely:

> "The Court has admitted evidence that the defendant has pleaded guilty to the possession of a still upon another occasion at Salada Beach. You are to take that evidence into consideration, gentlemen, only in your determination of the first count or charge in the complaint; that first count charges that the defendant here had in his possession jackass brandy and other things for the purposes of sale, and that in that he maintained a common nuisance. The so-called Volstead Act provides that where a man has in his possession alcoholic liquor for the purpose of sale that constitutes a nuisance. That evidence has been introduced merely as bearing upon the question as to whether or not, if you find that this liquor was in the possession of this defendant, whether he had it there for a commercial purpose or for his own use. Under such circumstances, however, the law presumes that where a man has liquor in his possession that he has it for purposes of sale; that is to say, if you are found

> with liquor in your possession in any other place than your private house, that constitutes prima facie evidence that you had it for sale. Therefore on the first count if you determine, that he did have liquor in his possession you are likewise to determine whether he had it for sale."
>
> (Trans. Rec. page 59.)

This is the answer plaintiff in error received to his many demands that he be tried only on the evidence pertaining to his arrest on the date set forth in the information. And to his requests that the District Attorney not try him as a bad man or as a flagrant bootlegger, but as a fellow human being on trial for his liberty. It is submitted that all the defendant asked was an ordinary trial. He did not ask the Court for any favor or something that he was not entitled to but just a fair opportunity to tell his story and have an American jury pass upon it with the Government's material testimony. Trials are essentially for the accused. In uncivilized lands there are no trials. Capture and arrest constitute due process of law.

Here are the remarks of the United States Attorney and the proceedings had in relation to same:

> "Mr. McDonald. In this case, gentlemen, we have one of the most flagrant and persistent offenders against the Prohibition Act in this District. He was first apprehended by agents Toft and Cory at Miramar (a palpable misstatement of the evidence).
>
> Mr. O'Dea. For the protection of the defendant's rights, your Honor, if this evidence was admitted for any purpose it was admitted

for only one purpose, to show that if he possessed that liquor at this place, or that still, that he possessed it with a guilty knowledge. The District Attorney is not to be permitted to argue the proposition that because this man was arrested once before he is likely to have committed this offense here. I wish to take an exception to the District Attorney's remarks and assign them as misconduct and I ask your Honor to instruct the jury that if the evidence is to be considered at all the purpose for which it is, is to be considered.

The Court. That is just what I will do, Mr. O'Dea. I did not understand Mr. McDonald's opening statement or his argument to go any further than that.

Mr. O'Dea. He said, we have here one of the most flagrant bootleggers in California and that this man was arrested by agent Cory at such and such a date. That is what I am objecting to."

We submit that the following question asked by the Court did not redound to the advantage of plaintiff in error.

"The Court. What is it you are objecting to, that he is a flagrant bootlegger?

Mr. O'Dea. To that and to his conclusion that he is a flagrant bootlegger from the fact that he was arrested before.

The Court. Of course, the District Attorney has a perfect right to narrate any evidence that has been admitted to the jury. The statement that he is a flagrant bootlegger is for the jury to determine and not to be taken from the District Attorney. It will be determined from the evidence in this case. You will be instructed hereafter, gentlemen, as to the purpose for which evidence of other crimes was admitted. Proceed, Mr. McDonald."

It is well to observe here that the defendant was not on trial for being a flagrant bootlegger nor was he charged with any species of National vagrancy. This is how Mr. McDonald proceeded:

> "Mr. McDonald. *Now, gentlemen, from those two facts and from the testimony you have heard today,* from Mr. Power's statement that he followed him to this place on numerous occasions (see how this compares with the testimony. Trans. Rec. pages 23 and 24), saw him there, and that he came in there while the raid was going on and statements that he made to Mr. Powers at the time (what were they?) and the statement that he made to agent Bernhard 'that he wanted to fix things up,' I am going to ask you, gentlemen, what do you think of the case? Do you think there is any reasonable doubt that this man was running that still out there on Hampshire Street? It does not make any difference, gentlemen, whether it was 950 or 590, or what the number was, he was running a still in the Northern District of California, and that is sufficient. You will be so instructed by the Court.
>
> Mr. O'Dea. I didn't wish to interrupt the District Attorney, but now that he is through with his opening argument, I wish to take an exception to the reference, after your Honor had mentioned the matter, to Salada Beach and Miramar as having nothing to do with the issues in this case and as prejudicial to the rights of this defendant.
>
> The Court. Let the exception be noted.
>
> Mr. O'Dea. And I ask your Honor to instruct the jury to disregard that statement of the District Attorney.
>
> The Court. I will instruct them to the best of my ability what the purpose of that testimony is."

And in the closing argument of the United States Attorney, these proceedings were had:

> "Mr. McDonald. I am going to ask you to take into consideration his connection with that former case. His prior record in connection with the still.
>
> Mr. O'Dea. I object to that and take an exception to it, and ask your Honor to instruct the jury regarding it.
>
> The Court. Yes, I will instruct the jury in reference to it." (Trans. Rec. pages 55 to 57.)

If the Court permitted this testimony to be admitted in evidence for the purpose of showing that the defendant maintained a nuisance continuously on the premises herein described, it was not proper for the United States to argue that from those facts the defendant was a bad man, one of the worst bootleggers in the State of California and very likely from those facts to have committed the crime charged in the information in the instant case.

Further argument of citation is unnecessary to establish this last point.

When Plaintiff in Error Asked the Court to Instruct the Jury to Disregard Prejudicial Testimony and Remarks of the United States Attorney and the Court in Effect Said It Would Do So and It Did Not, His Exceptions Are Not Lost By His Failure to Again Request the Court to So Instruct the Jury When He Found the Court Had Not Done So.

(See *Boyd v. United States,* 142 U. S. 451; *Sischo v. United States,* 296 Fed. 696).

The subject under discussion in a degree was covered by plaintiff in error in the last subdivision of this brief. It would be well, however, to call the Court's attention to these cases:

Williams v. United States, 168 U. S. 382;
Graves v. United States, 150 U. S. 118;
Hall v. United States, 150 U. S. 76;
Wilson v. United States, 149 U. S. 60;
Sischo v. United States, 296 Fed. 696 (C. C. A. 9th Circuit);
Wright v. United States, 288 Fed. 428;
Skuy v. United States, 261 Fed. 316;
McKnight vs. United States, 97 Fed. 208.

United States Supreme Court Justice Harlan in deciding the case of *Williams v. United States,* 168 U. S. 382, in discussing questions similar to those in the instant case, said:

> "Another assignment of error deserves to be noticed. One of the witnesses for the defense was the collector of customs for the port of San Francisco. He was asked to whom, upon his return from Washington, was assigned the in-investigation of female cases. The court having inquired as to the purpose of this testimony, the attorney for the accused said: 'It has been sworn to by Mr. Tobin that Mr. Williams asked for certain cases to be assigned to him and show the result. We propose to show by Mr. Wise that on his return from Washington he assigned to Williams the investigation of Chinese female cases, and while Mr. Williams was acting in that behalf there were more females sent back to China than ever went back before or after.' The representative of

> the Government objected to this evidence as irrelevant, saying in open court, and presumably in the hearing of the jury, 'No doubt, every Chinese woman who did not pay Williams was sent back.' The attorney for the accused objected to the prosecutor making any such statement before the jury. The court overruled the objection, and the defendant excepted. The objection should have been sustained. The observation made by the prosecuting attorney was, under the circumstances, highly improper, and not having been withdrawn, and the objection to it being overruled by the court, it tended to prejudice the rights of the accused to a fair and impartial trial for the particular offenses charged."

The United States Supreme Court, in reviewing prejudicial remarks made by a United States Attorney in his closing argument to the jury, and the Court's refusal to instruct the jury to disregard same when called upon to do so, said, in the case of *Hall v. United States,* cited supra:

> "But the district attorney did not content himself with alluding to the supposed fact by way of illustration. He relied upon it, and upon his inference therefrom that the defendant's hands were stained with the blood of negro, and other like expressions and declarations of his own, to establish that 'the killing of a negro in Mississippi, for which the defendant had been tried and acquitted there, was murder.' This whole branch of his argument was evidently calculated and intended to persuade the jury that the defendant had murdered one man in Mississippi, and should therefore be convicted of murdering another man in Arkansas.

The attempt of the prosecuting officer of the United States to induce the jury to assume, without any evidence thereof, the defendant's guilt of a crime of which he had been judicially acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a breach of professional and official duty, which, upon the defendant's protest, should have been rebuked by the court and the jury directed to allow it no weight.

The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitles him to a new trial. Wilson v. United States, 149 U. S. 60, 67, 68 (37: 650, 652)."

CONCLUSION.

It is respectfully submitted that for the substantial and not technical reasons stated in this brief, to-wit: (1) A variance between the facts set forth in the information and the proof upon a material matter; (2) The admission in evidence of immaterial, irrelevant and collateral matters prejudicial in their very nature, which deprived plaintiff in error of his right to a fair trial by an impartial jury; (3) Misconduct on the part of the United States Attorney permitted by the Court in the face of strenuous objections of plaintiff in error.

That the judgment of the lower Court should be reversed.

Dated, San Francisco,
March 13, 1925.

EDWARD A. O'DEA,
Attorney for Plaintiff in Error.

No. 4593

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY HEITMAN,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STERLING CARR,

United States Attorney,

T. J. SHERIDAN,

Asst. United States Attorney,

Attorneys for Defendant in Error.

FILED

Neal, Stratford & Kerr, S. F. 47600

No. 4393

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY HEITMAN,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT.

This is a writ of error to the District Court for the Northern District of California. The case was criminal and arose under the National Prohibition Act.

The information against the plaintiff in error filed June 13, 1923, was in three counts. The first charged that the defendant Henry Heitman and another on June 4, 1923, at 950 Hampshire Street, San Francisco, and within the jurisdiction of this court, maintained a common nuisance in that they did then and there wilfully and unlawfully keep for sale on the

premises aforesaid certain intoxicating liquors, to-wit:

> 2 120-gallon stills; 4 burners; 2 pressure tanks; 5 500-gallon vats; 3 hydrometers, 3,000 gallons of mash; 100 gallons of what is called jackass brandy.

In the second count it was charged that at the same time and place the defendants did unlawfully possess certain intoxicating liquor, to-wit:

> 2 120-gallon stills; 4 burners; 2 pressure tanks; 5 500-gallon vats; 3 hydrometers, 3,000 gallons of mash; 100 gallons of what is called jackass brandy, describing the same articles.

In the third count it was charged at the same time and place that defendants did wilfully and unlawfully have in their possession certain property designed for the manufacture of certain intoxicating liquor, thereupon describing certain property.

The defendant, Henry Heitman, was alone placed upon trial and convicted upon all counts (Tr. p. 13). Thereupon he was sentenced to be imprisoned for one year in the county jail of San Francisco and that he pay a fine of $300 or in default of payment that he be further imprisoned until the fine is paid or he be otherwise discharged by due process of law (Tr. p. 72).

The brief on behalf of plaintiff in error does not contain a statement of the evidence; we forbear to

add such a statement, believing that the points discussed do not require it. The following reference to the testimony while incomplete will indicate sufficient portions of the proof.

Witness BERNHARD, a Federal Prohibition Officer, on June 24, 1923, accompanied Agent Powers to 950 Hampshire Street. It was a dilapidated building. Witness guarded the back window and Powers went through the door. Witness entered, went up a ladder through a trap door into the upper floor and found there two 20 gallon stills complete and they were going, fires were under them. They were running full blast. Three thousand gallons of mash, 1000 gallons of Jackass Brandy, 3 hydrometers, 2 pressure tanks, 5 500 gallon vats, 8 15 gallon kegs, 3 50 gallon barrels, 4 barrels, 3 water tanks, and a lot of coaloil were found. In the rear of the barn there were two cars, a Ford Touring Car and a Ford Truck. When witness got in there was nobody up where the stills were going full blast but at the window which was open there was a cord rope hanging down which was the only way whoever was up there operating had to get down. Witness went out, leaving Agent Powers, returning in a moment. Witness saw Powers and defendant Heitman walking towards him. Powers said "This is Heitman, you know him don't you?" Then Heitman said, "Now, listen, here, can't we fix this thing up." "I don't want any trouble" (Tr. pp. 17-18).

Witness identified a bottle and contents, stating the

contents were out of the worm of the still that it was dripping ino the bucket.

Witness POWERS, a Federal Prohibition Agent, testified that he visited the premises at 950 Hampshire Street, that for a period of about six or seven weeks he had been following Heitman on account of remarks around town. That he found that Heitman twice entered the premises on Hampshire Street. One could smell the still in operation and the mash fermenting a block away. On the date in question witness entered the premises with Bernhard. Witness saw the stills in operation and seized them. A few minutes later defendant Heitman walked in and said "How do you do". Witness recognized him. He walked out, went directly to where the two Ford Machines were, the Manager (that is a man accosted when the officers first went there) walked up to him. Witness was about 10 or 12 feet behind. As he walked toward the machine the manager said "Here is one of them". Witness said: "Who operates the still?" and he said "Yes". I said "All right, Mr. Heitman, you are under arrest, come back". We walked back to where the stills were. I said, "You know me, don't you, Federal Agent Powers?" He said yes, Powers. I said you are under arrest. He said "Can't we fix it up". I said wait a minute, let us tell Bernhard about it. We walked over to Bernhard and he said again "Can't we fix it up fellows, I am in a jam", or some remark along that line. Witness said in this place was the property testified to by Agent Bernhard.

When Heitman walked into the paint shop and saw witness he stopped. He was going in the general direction of the stills when he saw witness.

Heitman testified on his own behalf and said he was arrested at 590 Hampshire Street, and not at 950 Hampshire Street, and that he did not own the property nor was he engaged is operating a still or manufacturing liquor at 590 Hampshire Street or at the place Powers said he was neither.

There was introduced in evidence the record of the conviction of defendant Heitman by his plea of guilty to one count of an information which count charged that on the 27th of November, 1922, at Salada Beach, County of San Mateo, he had in his possession certain property designed for the manufacture of liquor, being 2 40-gallon stills, 11 50-gallon barrels of mash, several sacks of grain and sugar then and there intended for use in violating the prohibition act.

The charge of the court is brought up in the bill of exceptions. There is also contained (Tr. p. 62) an instruction proposed by defendant which was refused by the court to the effect

> "if you find from the evidence that liquor was not kept for sale at 950 Hampshire Street in the City and County of San Francisco, State of California, then you must acquit defendant of the charge contained in the information of maintaining a common nuisance in violation of section 21 of Title 2 of the National Prohibition Act."

The court further instructed the jury that evidence had been admitted that the defendant plead guilty to the possession of a still upon another information at Salada Beach and that the jury were to take that evidence into consideration only in their determination of the first count of charge of the complaint, being the nuisance count (Tr. p. 59).

The principal stress of the argument of plaintiff in error in this court seems, as it appears to us, to be directed to the conviction upon the first count of the information.

ARGUMENT.

I.

Concerning variance in respect of nuisance count:

The greater portion of the argument for plaintiff in error concerns points limited to the first count of the information which charged a nuisance. Upon the authority of the case of

Hattner vs. U. S., 293 Fed. 381,

it is said that there was a variance between the crime charged and the crime proven in that while it was charged that the nuisance was maintained at 950 Hampshire Street, San Francisco, the premises were in fact at 590 Hampshire Street. It is said that the point arises in several different ways. As to the greater number of the exceptions so taken it is clear that the point is not well taken.

For example, complaint is made of the court's refusal to direct a verdict claimed upon the theory of the variance referred to. (Tr. p. 31). But there was evidence, even upon the point in question, sufficient to sustain a verdict for the government. For Agent Bernhard had testified (Tr. p. 16) that he accompanied Agent Powers to 950 Hampshire Street, and Agent Powers testified (Tr. p. 23), "I had occasion to visit the premises at 950 Hampshire Street", and thereupon the two agents described the incidents as occurring there. Thus the court properly denied the motion. It is true that there was testimony tending to show that the defendant was arrested at number 590 Hampshire Street. Accordingly, the matter came into controversy and an issue arose.

It is further contended that the court erred in striking out the testimony given by counsel for the defendant (Tr. pp. 32, 33). It seems to us, however, that as far as this exception goes, the ruling was proper for it would have been improper to permit counsel for the defendant to testify to his conclusion that a certain street number was the building "described by the witness".

Another exception arose upon the court's instruction in regard to the number of the street at which the still was found (Tr. p. 59). The court said, "that the question whether it was 950 or 590 was of no concern if you find that a still was actually found there". It is submitted that the statement related to counts two and three of the information charging that the

defendant possessed intoxicating liquor and possessed property designed for the manufacture of intoxicating liquor. It is submitted that as far as these counts are concerned, and the instruction apparently related to them, any such variance was immaterial and the jury were properly so told. Thus a charge that a sale was in one part of the city of San Francisco, while the proof was that in fact it was at another point, the variance would be immaterial and properly disregarded.

McDonough vs. U. S., 299 Fed. 30, 40.

Finally it is contended that the court erred in refusing an instruction proposed by the defendant as follows:

> "If you find from the evidence that liquor was not kept for sale at 950 Hampshire Street, in the City and County of San Francisco, State of California, then you must acquit the defendant of the charge contained in the information of maintaining a common nuisance in violation of Section 21, of Title II of the 'National Prohibition Act' ".

We do not disguise our opinion that, if the law was correctly stated in the case of

Hattner vs. U. S., supra,

this instruction should have been given. It is true that the situation in the Hattner case was that the different points referred to were some four miles apart. Here the variation in the street number could not have exceeded a few blocks. The proposition in-

volved is really the application of the Sixth Amendment to the effect that the defendant is entitled to be informed of the charge against him. Yet, it is held universally that the actual locus charged is not vital; the charge may otherwise be properly identified, hence a mere mistake in the locus would not be material. Here the defendant was charged with a nuisance which consisted in his maintaining a premises where liquor was sold. There is no dispute as to the premises which it is charged he maintained, that is to say, a certain barnlike, frame structure on Hampshire Street where there were two large smoking stills. An officer seeking to seize the property would have no trouble in determining that the proper building was the one where the stills were located. He would not be mislead by any mere variation in a number.

We think the ruling in the Hattner case must be referred to the particular transaction there involved, and that the alleged variance in the instant case would not be vital.

II.

As to evidence of other similar offenses.

The further contention is made by counsel that prejudicial error was committed by the court in allowing the government to prove that the defendant had been arrested for and committed other similar offenses.

It is claimed that the testimony referred to related to a different time and a different place. We think it is clear that the main contention of the government was sound. The defendant, as we have seen, was prosecuted in one count for the maintenance of a nuisance, that is to say, that he maintained a premises where intoxicating liquor was kept for sale in violation of Title II of the National Prohibition Act. In another count it is claimed that he had certain property designed for the manufacture of liquor intended for use in violation of the National Prohibition Act. Thus there was involved under the first count the element of the defendants intent in the premises, that is to say, the government was called upon to prove that liquors kept by the defendant upon the premises were kept by him for sale, and that the stills described were designed for the manufacture of liquor intended for unlawful use. There was thus involved an affirmative intent apart from a mere intent to violate a law shown by a commission of a forbidden act. Upon all authorities, in such case the government has the right to prove other similar offenses not too remote in time or place as an aid in convincing the jury that the defendant had the necessary criminal intent in the instant case. For, in the case of

> *Schultz vs. U. S.,* 200 Fed. 234, 237,

it was said:

> "If intent, motive, knowledge, or design be one of the elements of the crime charged, and

especially if it is claimed that the crime was committed in accordance with a system, plan, or scheme, evidence of other like conduct by the defendant at or near the time charged is admissible.

In so ruling the Circuit Court of Appeals of the Eighth Circuit cited the following cases:

Brown vs. United States, 142 Fed. 1

Dillard vs. United States, 141 Fed. 303

Walsh vs. United States, 174 Fed. 615

Ex parte Glaser, 176 Fed. 702,

Thompson vs. United States, 144 Fed. 14.

And in the same case the same Circuit Court decided the further proposition as to what is meant by a nearness of time or place when it said:

> "The question at once arises: What is meant by at or near the time of the transaction charged? This is a matter almost wholly confided to the discretion of the trial court. In *Packer vs. United States,* 106 Fed. 906, 46 C. C. A. 35, it was held that transactions a year prior to the one in question might be received in the discretion of the trial court."

It was further decided in the same case that evidence of such conduct on behalf of the defendant, even after the commission of the alleged crime might be admissible.

The same rule is frequently applied in National Bank prosecutions.

Thus in

Apgar vs. U. S., 255 Fed. 16, 19,

the Circuit Court of Appeals of the Fifth Circuit so ruled. In the Apgar case it is held that it was proper to show that the defendant had theretofore obtained money from his bank on a note that he knew to be forged, in that such testimony had some tendency to prove that when on *other occasions* he obtained the bank's money in the way charged; he did it with intent to injure and defraud it.

And in this Circuit the principle has been applied to a nuisance count in the case of

Hazelton vs. U. S., 293 Fed. 384.

Thus it is clear from the authorities cited that upon such a prosecution the government is entitled to prove another similar offense that such offense would not be too remote, if less than a year prior, and that whether the offense proposed to be proven be not too remote, is a matter to be determined by the discretion of the court.

In the instant case the crime prosecuted for was charged to have been committed June 4, 1923, at Hampshire Street, which is in the southeast portion of San Francisco. The government was permitted to prove a judgment upon a plea of guilty upon the first count of an information which charged that the

defendant on the 27th day of November, 1922, at Salada Beach, in the adjoining county, had in his possession certain stills designed for the manufacture of liquor intended for use in violating Title II of the National Prohibition Act. It was clearly not remote in time or place; it was clearly a similar offense and it was absolutely proven in that the defendant plead guilty and was sentenced. It may be pointed out that mere evidence that the defendant on the same occasion was arrested, would not add to or distract from the relevancy of the proof. The jury may have inferred that he could not have been prosecuted, unless he was arrested. Proof of arrest in the same connection would be mere preliminary matter of inducement and wholly without prejudice. Something is said about proof of another incident at an old barn in Valimar Canyon, an unidentified place, but it was further shown that the defendant was never arrested for that. The matter appearing at page 28 of the Transcript is apparently unconsequential, and would not necessarily require the court to instruct with reference thereto.

Moreover, if the court should determine that the verdict upon the first count is not sustainable upon the point of the variance in the street numbers, the exceptions discussed under this action could be wholly disregarded for the evidence here discussed was applied by the court wholly to the determination of the first count when it instructed the jury (Tr. p. 29) that the Salada Beach matter was only to be

taken into consideration upon determination of the nuisance count of the information.

III.

The Assistant United States Attorney was not guilty of misconduct in his argument.

It is contended that prejudicial error was committed by Assistant United States Attorney McDonald, both in his opening argument and his closing argument.

The first exception appears at pages 55 and 56 of the Transcript. It will be noted that the Assistant United States Attorney began by declaring that the defendant was one of the most flagrant and persistent offenders against the Prohibition Act in this district. If he was concerned in the maintenance of the still described, as the government had the right to ask the jury to infer, he *was* a flagrant offender against the Prohibition Act. Manifestly he was a persistent offender because he had been previously convicted and the government could properly have referred to such conviction upon at least one element in the case. Thereupon exception was taken to the remarks, and they were assigned as misconduct. The court was asked to instruct, and so far from refusing, it declared that it would do that very thing. The declaration of the court in itself would have cured any alleged error. There was a further discussion by counsel for the government and certain statements were made which seem to us to be inferences that the

government was entitled to draw from the testimony. At the end an exception was noted and the court asked the jury to disregard the statement. The court responded: "I will instruct them to the best of my ability what the purpose of that testimony is," and, as we have seen, an appropriate instruction was given as to evidence of other similar offenses. If the matter were of any importance, it would have thus been cured.

Further strictures are made upon a statement in the closing argument for the government as follows: "I am going to ask you to take into consideration his connection with that former case, his prior record in connection with the still". That is no more than asking the jury to consider the conviction in the former case, being evidence of a similar offense upon the issue of the defendant's intent in the nuisance count, and as we have seen, the court confined that line of testimony to that issue. Manifestly the matter was not even erroneous; in any event it could not have been deemed prejudicial.

Accordingly, it is submitted that the conviction of the defendant upon counts two and three of the information is unimpeachable. In fact the argument of the defendant here adduced would have a bearing only upon the first count. We do not deem that defendant's contention as to the first count had any merit whatever apart from the point of the variance of the place of the alleged nuisance. It is not disputed that this point may be grave, but the matter

is submitted to the court with the suggestion that even if the sentence must be reversed as to the first count, it should clearly be sustained as to counts two and three.

Respectfully submitted,

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T. J. SHERIDAN,
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Attorneys for Defendant in Error.